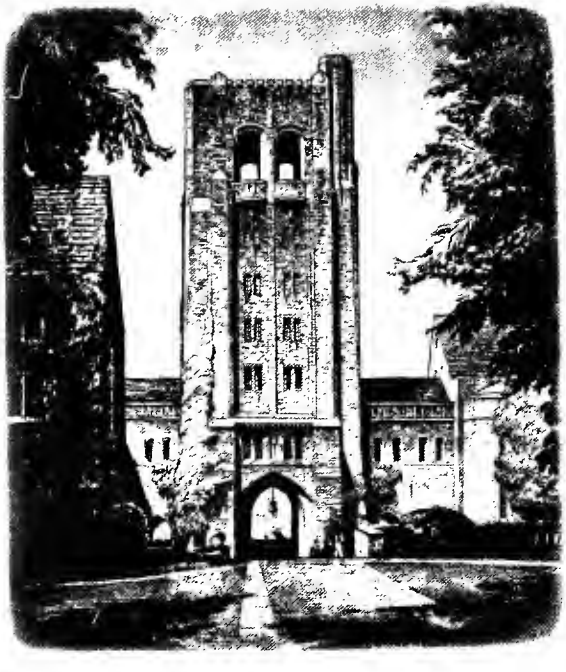

FEDERAL COURT RULES ANNOTATED

RULES OF PRACTICE

IN THE

United States Circuit Court of Appeals

FOR THE

THIRD CIRCUIT

AND IN THE

United States District Court

FOR THE

Middle District of Pennsylvania

At Law and in Bankruptcy
With Annotations

By
R. W. ARCHBALD

NEWARK, N. J.
SONEY & SAGE
1912

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MIDDLE DISTRICT OF PENNSYLVANIA. *ss.*

ORDERED, that the Rules of Court of the Middle District of Pennsylvania, including the Rules in Bankruptcy, as printed by Soney & Sage, are hereby adopted as the authorized edition of the Rules of Court of this District.

October 1, 1912.

CHARLES B. WITMER,

District Judge.

INTRODUCTION.

The Circuit Court of Appeals of each circuit consists of three judges, of whom two constitute a quorum (*a*); and is to be made up from the Justice of the Supreme Court assigned to the circuit, the Circuit Judges, and the several District Judges of the circuit (*b*). The judges of the Commerce Court may also be assigned as Circuit Judges to the Court of Appeals of any circuit for service (*c*).

There are now four Circuit Judges in the second, seventh and eighth circuits; three in the first, third, fifth, sixth and ninth; and two in the fourth. The attendance of the District Judges on the Court of Appeals of their respective circuits is conditioned by the statute on whether a full Court is made up without them by the attendance of the Supreme Court Justice assigned to the Circuit and the Circuit Judges, and may be regulated by general or particular assignment. It is governed in the fifth circuit by a standing order (*d*); as it is also in practice in the third circuit; and possibly in the others. The freedom with which the composition of the court may be adjusted to meet any emergency is one of the great merits of the system. It is competent for three District Judges, duly designated, to hold a Circuit Court of Appeals (*e*). No judge may sit in a case in which he sat in the Court below, and if he does it vitiates the judgment (*f*).

The Third Judicial Circuit of the United States is made up of the Eastern, Western, and Middle Districts of Pennsylvania, the District of New Jersey and the District of Delaware (*g*); and the Court of Appeals of the Circuit sits at Philadelphia (*h*). There are two terms of court in each year, beginning on the first Tuesday of March and the first Tuesday of October.

The Circuit Judges in commission in the Third Circuit at this time are Hon. George Gray of Wilmington, Delaware, appointed by President McKinley in 1899; Hon. Joseph Buffington of Pittsburg, Pennsylvania, appointed by President

Roosevelt in 1906; and Hon. John B. McPherson of Philadelphia, Pennsylvania, appointed by President Taft in 1912.*

The District Judges, in the order of their appointment, are as follows: Hon. Edward G. Bradford, of the District of Delaware, appointed by President McKinley in 1897; Hon. James B. Holland, of the Eastern District of Pennsylvania, appointed by President Roosevelt in 1904; Hon. Joseph Cross of the District of New Jersey, appointed by President Roosevelt in 1905; Hon. James S. Young, of the Western District of Pennsylvania, appointed by President Roosevelt in 1908; Hon. Charles P. Orr, of the Western District of Pennsylvania, appointed by President Taft in 1909; Hon. John Rellstab, of the District of New Jersey, appointed by President Taft in 1909; Hon. Charles B. Witmer, of the Middle District of Pennsylvania, appointed by President Taft in 1911; and Hon. J. Whitaker Thompson of the Eastern District of Pennsylvania, appointed by President Taft in 1912.

(*a*) Act March 3, 1911, Sect. 117. 36 Stat., 1131.

(*b*) Act March 3, 1891, Sect. 3. 26 Stat., 827. Act March 3, 1911, Sect. 121. 36 Stat., 1132.

(*c*) Act March 3, 1911, Sect. 205. 36 Stat., 1148.

(*d*) 150 Fed. lxxxv.

(*e*) Peters v. Hanger, 134 Fed., 586. 136 Fed., 181. See also McKnight v. Cramer Furniture Co., 189 Fed., 48. Kreplik v. Couch Patents Co., 190 Fed., 565.

(*f*) American Construction Co. v. Jacksonville Railway, 148 U. S., 372. Moran v. Dillingham, 174 U. S., 153.

(*g*) Act March 3, 1911, Sect. 116. 36 Stat., 1131.

(*h*) Ibid, Sect. 126. 36 Stat., 1132.

* Hon. William M. Lanning, of Trenton, New Jersey, appointed by President Taft in 1909, who was in office when the following Rules of Court were adopted, died February 16, 1912, pending their preparation for publication.

RULES (a)

OF THE

United States Circuit Court of Appeals

FOR THE

THIRD CIRCUIT.

Adopted in Open Court, June 16, 1891.

Revised January 31, 1910, to Take Effect March 1, 1910.

(*a*) The right to make rules of practice inheres in every Court. 8 Amer. & Eng. Encycl. Law, 2 Ed., p. 29. 11 Cycl., 740. 1 Rose Fed. Proced., Sect. 801. The Circuit Courts of Appeal are also given the specific power by statute. Act March 3, 1891, Sect. 2. 26 Stat., 826. Act March 3, 1911, Sect. 122. 36 Stat., 1132. In pursuance of this authority a set of rules applicable to all the circuits was originally promulgated. 150 Fed., xxv-xxxvi; and these form the basis of those which are now in force in the various circuits with certain modifications. 150 Fed., xxxvii-cxxxviii. 188 Fed., v-xxviii. 193 Fed., i-xx. 2 Rose Fed. Proced. p. 1872-2040. 3 Foster's Fed. Prac., 2465-2507. They are largely predicated upon the Rules of the Supreme Court, to be found in 222 U. S., appendix. See also 2 Rose Fed. Proced., 1761-1778. 3 Foster's Fed. Prac., 2448-2464. As so promulgated they have the force and effect of law to the extent that they are applicable. American Graphophone Co. v. National Phonograph Co., 127 Fed., 349. United States v. Barber Lumber Co., 169 Fed., 184. The Rules of the Third Circuit, which make up the present collection, went into effect March 1, 1910, and have been revised down to the date of this publication. Their arrangement under heads does not necessarily control their construction. United States v. Cigars, 138 Fed., 166. The titles are as fixed by the Court, except as otherwise indicated.

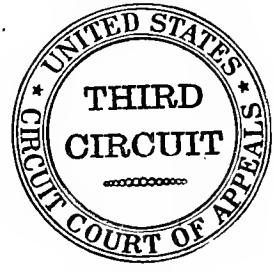
RULE 1. NAME.

The court adopts "United States Circuit Court of Appeals (*a*) for the Third Circuit" as the title of the court.

(*a*) This is the title imposed by the organic act creating these Courts. Act March 3, 1891, Sect. 2. 26 Stat., 826. Act March 3, 1911, Sect. 117. 36 Stat., 1131. A defect in the title is not fatal to a pleading but substantial accuracy in the designation of the Court should be observed. 31 Cycl., 93, 94.

RULE 2. SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Third Circuit" (*a*) in two lines in the centre, with a dash beneath.



(*a*) Except in the designation of the number of the Circuit the seal in all the Circuits is the same.

RULE 3. TERMS.

The terms of this court shall commence and be held on the first Tuesday of March and the first Tuesday of October in each year, at the city of Philadelphia.

The terms in the several Circuits are as follows:

First Circuit; one term annually at Boston, Mass., on the first Tuesday of October, with stated sessions on the first Tuesday of every month thereafter. 150 Fed., xxxvii.

Second Circuit; one term annually at New York on the third Tuesday of October. 150 Fed. xlix.

Third Circuit; two terms annually at Philadelphia, Pa., on the first Tuesday of March and the first Tuesday of October.

Fourth Circuit; three terms a year, at Richmond, Va., on the first Tuesday of February, May and November; with special sessions on the second Tuesday of every month, in which there is no regular session. 193 Fed., v.

Fifth Circuit; at Atlanta, Ga., on the first Monday of October; at Montgomery, Ala., on the third Monday of October; at Forth Worth, Texas, on the first Monday of November; and at New Orleans, La., on the third Monday of November, 150 Fed., lxxvii.

Sixth Circuit; one term annually at Cincinnati, Ohio, on the Tuesday after the first Monday of October, with adjourned sessions on the Tuesday following the first Monday of each month thereafter, excepting August and September. 150 Fed., lxxxvii.

Seventh Circuit; one term annually at Chicago, Ill., on the first Tuesday of October divided into three sessions to begin on the first Tuesday of October, January and May respectively. 150 Fed., xcviii.

Eighth Circuit; three terms annually, at St. Paul, Minn., on the first Monday of May; at Denver, Col., on the first Monday of September; and at St. Louis, Mo., on the first Monday of December. 188 Fed. v.

Ninth Circuit; at Seattle, Wash., on the second Monday of September; at Portland Ore., on the third Monday of September; and at San Francisco, Cal., on the first Monday of October, with adjourned sessions on the first Monday of each month thereafter. 150 Fed., cxxxiv, cxxxv.

Writs of error and appeals from Alaska are heard at San Francisco, Portland or Seattle, according as the trial Court shall determine; subject however to stipulation otherwise by the attorneys. Act March 3, 1911, Sect. 135. 36 Stat., 1135.

The terms so fixed in the various circuits are in part controlled by statute. Act March 3, 1911, Sect. 126, et seq. 36 Stat., 1132.

RULE 4. QUORUM.

1. If, at any term, a quorum (*a*) does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time (*b*), or, in the absence of any judge, the clerk (*c*) may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day, and, in the absence of all the judges, the clerk may adjourn the court from day to day.

[C. C. A. Rule 4, Sect. 1, in force in all the Circuits.]

(*a*) Any two of the judges competent to sit in the Court of Appeals constitute a quorum. Act March 3, 1911, Sect. 117. 36 Stat., 1131. But no judge before whom the cause or question may have been tried or heard in the Court below may sit in the Court of Appeals on the trial or hearing of such cause or question. Ibid. Sect. 120. 36 Stat., 1132. Where this is not observed it vitiates the proceedings. Morgan v. Dillingham, 174 U. S., 153. But this would not seem to apply to a mere ministerial act not involving discretion or judgment. 17 Amer. & Eng. Encycl. Law, 2 Ed., 744.

(*b*) This rule is in line with the authority conferred by statute on the judges of the Supreme Court. Rev. Stat. Sect. 685, 686. Act March 3, 1911, Sect. 231, 232. 36 Stat., 1156. But it does not seem to have been directly extended to the Courts of Appeal.

(*c*) The delegation of authority to the clerk may be questioned, the function in its nature being judicial. State v. McBain, 102 Wisconsin, 431. Wight v. Wallbaum, 39 Ill., 554. In re Terrill, 52 Kansas, 29.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to [the] hearing, trial, or decision thereof.

[C. C. A. Rule 4, Sect. 2, in force in all the circuits.]

RULE 5. CLERK (*a*).

1. The clerk's office shall be kept in the City of Philadelphia (*b*).

(*a*) The clerk is appointed by the Court and exercises the same powers and performs the same duties in regard to all matters within his jurisdiction as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable. Act March 3, 1911, Sect. 124. 36 Stat., 1132. He is authorized to appoint, with the approval of the Court, such number of deputies as the Court may deem necessary, who are removable at pleasure with the approval of the Court; and in case of his death continue in office, unless removed, performing his duties until a clerk has been appointed and qualified. Ibid, Sect., 125.

(*b*) The clerks' offices in the various circuits are as follows: First Circuit at Boston, Mass.; Second Circuit at New York, N. Y.; Third Circuit at Philadelphia, Pa.; Fourth Circuit at Richmond, Va.; Fifth Circuit at New Orleans, La.; Sixth Circuit at Cincinnati, Ohio; Seventh Circuit at Chicago, Ill.; Eighth Circuit at St. Lous, Mo.; and Ninth Circuit at San Francisco, Cal.

2. The clerk shall not practice either as attorney or counsellor in this court or in any other court while he shall continue to be clerk of this court (*a*).

[S. C. Rule 1, Sect. 1. C. C. A. Rule 5, Sect. 2, in force in all the circuits.]

(*a*) No clerk or assistant or deputy clerk of any territorial, district, or Circuit Court of Appeals, or of the Court of Claims, or of the Supreme Court of the United States, shall act as a solicitor, proctor, attorney or counsellor in any cause depending in any of said Courts or in any district for which he is acting as such officer under penalty of being stricken from the rolls. Act March 3, 1911, Sects. 273, 274. 36 Stat., 1164.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court (*a*). A copy of

such bond shall be entered on the journal of the court, and the bond shall be deposited for safe keeping as the court may direct (*b*).

[C. C. A. Rule 5, Sect. 3, in force in all the circuits.]

(*a*) The bond of the clerk is available to a private suitor to indemnify him for failure by the clerk to perform the duties devolving upon him, as by the refusal to issue a process ordered. United States v. Bell, 127 Fed., 1002. 135 Fed., 336.

(*b*) The production of the bond with the approval of the Court thereon is a sufficient prima facie authentication in a suit brought to enforce the same. Hartz v. Commonwealth, 1 Grant (Pa.), 359. Where the bond is lost, it may be proved by the entries on the record. Harvey v. Thomas, 10 Watts, 63. Boyd v. Commonwealth, 36 Pa., 355.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court (*a*).

[S. C. Rule 1, Sect. 2. C. C. A. Rule 5, Sect. 4, in force in all the circuits.]

(*a*) This corresponds with the English practice. Taylor Evid., Sect. 1532. Private persons have no right to remove public records or papers from the office or files where they belong; when permission is given to do so, it is a matter of favor and not of right. French v. Neal, 24 Pick. (Mass.), 55. Sternberger v. McSween, 14 S. Car., 35. A record may be proved by a compared or officially certified copy. 24 Amer. & Eng. Encycl. Law, 25 Ed. 198. And instead of removing the originals, copies should be taken where they will do. Federal Chemical Co. v. Green, 33 Ky. Law Rep., 671. 110 S. W., 859. Seay v. Yarborough, 94 N. C., 291. The original may sometimes be necessary, as in case of perjury or forgery. Taylor Evid., Sect. 1535; in which case leave will be granted as a matter of right. Anon, 1 Ves. Jr., 152. Jervis v. White, 8 Ves., 313. Keenan v. Boylan, 1 Sch. & Lef., 232. Stratford v. Greene, 1 Ball & Beat., 296. But otherwise, by reason of the danger of loss or mutilation, a record should not be removed. Taylor Evid., Sect. 1534. Where material to be produced, a subpoena duces tecum to the custodian is the proper means. Fox v. Jones, 7 B. & C., 732. Dunham v. Chicago, 55 Ill., 357. Dickinson v. Kingsbury, 8 Cal. App., 179. 96 Pacf., 329.

RULE 6. MARSHAL, CRIER AND OTHER OFFICERS.

1. The marshal (*a*) and crier (*b*) shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

[C. C. A. Rule 6, in force in all the circuits.]

(*a*) Originally each of the Courts of Appeal had a marshal of its own appointed by the court. Act March 3, 1891, Sect. 2. 26 Stat., 826. But this was repealed, and the marshal of the district in which the court is held is now made the marshal of the Court. Act July 16,

1892, Sect. 1. 27 Stat., 222. Act March 3, 1911, Sect. 123. 36 Stat., 1132.

(*b*) Criers and bailiffs are officers of the court. United States v. McCave, 129 Fed., 708. They are entitled to three dollars a day for each day they attend under the order of the court, whether the court is opened or not. Ibid. Act March 3, 1905. 33 Stat., 1259.

RULE 7. ATTORNEYS AND COUNSELLORS.

1. All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any Circuit Court of the United States, shall become attorneys and counsellors in this court (*a*), on taking an oath or affirmation in the form prescribed by Rule 2 of the Supreme Court of the United States (*b*) and on subscribing the roll (*c*), but no fee shall be charged therefor (*d*); and all attorneys and counsellors of the Circuit Courts of the United States for the Third Circuit, shall be attorneys and counsellors of this court without taking any further oath.

[C. C. A. Rule 7, in force, with modifications, in all the circuits.]

(*a*) The admission of an attorney is a judicial act. The Legislature may prescribe the necessary qualifications, but cannot otherwise control it. Ex parte Secombe, 19 How., 9. Ex parte Garland, 4 Wall., 333. Brackenridge's Case, 1 Serg. & Rawle, 187. Splane's Petition, 123 Pa., 527. Manning v. French, 149 Mass., 391. In re Cooper, 22 N. Y., 67.

Attorneys are officers of the court, but are not officers of the United States. Ex parte Garland, 4 Wall., 333. Savings Bank v. Ward, 100 U. S., 195. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively are permitted to manage and conduct causes therein. Rev. Stat., Sect. 747. Women are eligible to practice in the Supreme Court. Act Feb. 15, 1879. 20 Stat., 292. The clerk is prohibited from practicing in any Court (Rule 5 supra); and the assistant or deputy clerks and the marshal and deputy marshals, in any cause depending in the Court of Appeals. Act March 3, 1911, Sects. 273, 274. 36 Stat., 1164.

(*b*) The form of oath in the Supreme Court is as follows:

"I, ..., do swear (or affirm), that I will demean myself as an attorney and counsellor of this Court uprightly and according to law; and that I will support the Constitution of the United States." S. C. Rule 2, Sect. 2. 2 Rose Fed. Proced., 1761.

(*c*) See generally 1 Tidd Prac., 71. The admission of an attorney to practice must be proved by the record, which is primarily the roll where his name is entered. Foster v. Cale, 1 Strange, 76. And it may also be shown by a book into which the names are copied alphabetically therefrom. Rex v. Crossley, 2 Esp., 526. Humphreys v. Harvey, 1 Bingh. N. C., 62. Hence the judgment, when an attorney is disbarred, is that he be stricken from the rolls. Foster v. Cale, 1 Strange, 76. Humphreys v. Harvey, 1 Bingh. N. C., 62. Per Park J. Where an attorney, for proper reasons, has changed his name, the roll may be

changed to correspond. In re James, 5 Exch., 310. In re Dearden. Ibid, 740. Re Matthews, 16 Beav., 245. Enrollment cannot be entered *nunc pro tunc,* where it is required by statute before beginning practice. Ex parte Fellows, 3 Ill. (2 Scam.), 369.

(*d*) In the fourth circuit, by rule of court, there is a fee of $5; and in the fifth and sixth a fee of $10. For the admission of attorneys in the District Courts the clerk, by statute, is limited to a charge of $1. Act June 28, 1902. 32 Stat., 476. By the construction of the Attorney General's Office, this includes the certificate issued by the clerk.

RULE 8. PRACTICE.

1. The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

[C. C. A. Rule 8, in force in the same form in all the circuits.]

The various Circuit Courts of Appeals Rules are predicated upon and closely follow those of the Supreme Court, which furnish a guide when the Circuit Court of Appeals Rules themselves are silent. The state practice conformity act is limited to the practice and proceedings in the trial court, and has nothing to do with proceedings on appeal or preparatory thereto. Gillum v. Stewart, 112 Fed., 30. Francisco v. Chicago & Albany R. R., 149 Fed., 354. Ghost v. United States, 168 Fed., 841.

RULE 9. PROCESS.

1. All process (*a*) of this court shall be in the name of the President of the United States, and shall be in like form, (*b*) and tested in the same manner as process of the Supreme Court.

[S. C. Rule 5, Sect. 1. C. C. A. Rule 9, in force without modification in all the circuits.]

(*a*) All process must be under the seal of the Court and signed by the clerk; Rev. Stat. Sect. 911; and bear teste from the date of its issue. Rev. Stat. Sect. 912. In these respects the state practice does not control. Gillum v. Stewart, 112 Fed., 30. The return is governed by Rule 14, Sect. 6, infra. Writs of error returnable to the Circuit Court of Appeals may be issued as well by the clerk of the District Court under its seal as by the clerk of the Court of Appeals. Rev. Stat. Sect. 1004. Act January 22, 1912. 37 Stat., —. Massina v. Cavazos, 6 Wall., 355, 357. Sheppard v. Wilson, 5 How., 210. Northern Pacific R. R. v. Amato, 49 Fed., 881, 882. But they must be attested in the name of the Chief Justice, and not of the District Judge. Long v. Farmers' State Bank, 147 Fed., 360.

A defective writ may be amended, a mistake in the teste and return corrected, and the want of a seal supplied. Rev. Stat. Sects. 954, 1005. Texas & Pacific R. R. v. Kirk, 111 U. S., 486. It has been held, however, that there must be something by which to amend. Dwight v. Merritt, 4 Fed., 614. Brown v. Pond, 5 Fed., 30, 37. A motion to dismiss on the ground of defects in the writ is too late two days before the argument, after the defendant in error has filed a brief and taken issue on the assignments. Long v. Farmers' State Bank, 147 Fed., 360.

The Court of Appeals cannot issue a writ of prohibition as original and independent process, but only in aid of its appellate jurisdiction. Zell v. Judges, 149 Fed., 86. And the same is true of mandamus. United States v. Judges, 85 Fed., 177, 179; Barber Asphalt Co. v. Morris, 132 Fed., 945; McClellan v. Carland, 217 U. S., 268, 279; Covington & Cincinnati Bridge Co. v. Hager, 203 U. S., 109; and habeas corpus. Whitney v. Dick, 202 U. S., 132. In ex parte Crawford, 154 Fed., 769, a case of habeas corpus, the question was not raised.

(*b*) For form of writ of error see 2 Loveland's Fed. Forms, No. 1311; and for form of citation see Ibid, No. 1317. The parties should be correctly described in the writ as they are to appear, and be styled in the Appellate Court as well as the way they appear in the Court below. Massina v. Cavazos, 6 Wall., 355-361. If a writ of error designates the parties as plaintiff and defendant, following their position in the Court below, while it is a clerical mistake, it does not affect the right to prosecute the proceedings. Hackfeld v. United States, 141 Fed., 9.

RULE 10. BILL OF EXCEPTIONS (*a*).

1. The judges of the circuit and district courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law (*b*), nor shall a series of exceptions be allowed which produces the same result (*c*). But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire (*d*), shall be specified in writing or dictated to the stenographer, and shall be specific and not general (*e*).

[S. C. Rule 4, Sect. 1. C. C. A. Rule 10, Sect. 1, in force in substance in all the circuits.]

(*a*) For the form of a bill of exceptions and what it should contain and when and how it is to be settled, see District Court Rules 44, 45, 46, and notes, infra, p. 106. Also 2 Rose Fed. Proced., Sect. 1932; and 1 Loveland Fed. Forms, Nos. 138 and 139.

The evidence in an action at law is only brought into the record by a bill of exceptions. Suydam v. Williamson, 20 How., 427, 433. England v. Gebhardt, 112 U. S., 502. And the same is true of the rulings of the court upon the admission or rejection of evidence and the instructions to the jury. Storm v. United States, 94 U. S., 76, 81. Claassen v. United States, 142 U. S., 140, 147. Newport News Co. v. Pace, 158 U. S., 36. A ruling of the trial court can only be reviewed on appeal where it has been challenged by an exception. Potter v. United States, 122 Fed., 49.

Evidence not contained in the bill of exceptions will not be considered. Lee Won Jeong v. United States, 145 Fed., 512. But it may be included in the bill by appropriate reference over to other parts of the record where it is found. Jones v. Buckell, 104 U. S., 554, 556.

The bill of exceptions should contain the rulings of the court excepted to and so much of the testimony as is necessary to explain the bearing of these rulings on the issues involved, and should be confined to this and not bring in superfluous or irrelevant matters. Lincoln v. Claflin, 7 Wall., 132, 136. Laber v. Cooper, Ibid, 565. The Francis Wright, 105 U. S., 381, 389. Block v. Darling, 140 U. S., 234. Newport News Railway v. Yount, 136 Fed., 589.

No exceptions to rulings at the trial can be considered unless they were taken at the time, and were also embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order of court entered at the term; by standing rule of court; or by consent of parties. And save under very extraordinary circumstances they must be allowed by the judge and filed with the clerk during the same term. After the term has expired without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been taken, all authority of the court to allow a bill of exceptions, then presented, or to alter or amend one already allowed and field, is at an end. Jennings v. Phil., Balt. & Wash. R. R., 218 U. S., 255.

Extraordinary circumstances, however, will excuse the failure to sign a bill of exceptions at the same term. Koewing v. Wilder, 126 Fed., 472; and such circumstances exist where the exhibits were mislaid without fault or negligence of the plaintiff in error and not found until after the term had expired; Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed., 466; or where the stenographer is unable to transcribe his notes within the time fixed for settling the bill. Dalton v. Gunnison, 165 Fed., 873; or the judge who tried the case was unable by reason of illness to sign the bill. Roberts v. Bennett, 135 Fed., 748. But these extenuating facts should be certified, if possible, by the trial judge. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed., 466. Jones v. Grover & Baker Sewing Machine Co., 131 U. S., cl. Michigan Ins. Bank v. Eldred, 143 U. S., 293. A bill of exceptions must be signed by the trial judge. That his initials are at the foot of it is not enough. Origet v. United States, 125 U. S., 240. United States ex rel Kinney v. United States Fidelity & Guaranty Co., 222 U. S., 283. It will not be regarded if it is not signed. Knight v. Illinois Central R. R., 180 Fed., 368. Nor can the failure to sign be supplied by an attached certificate by the judge that it had been settled and signed within the time allowed by law. Oxford & Coast Line R. R. v. Union Bank, 153 Fed., 723; nor by a stipulation of counsel that the bill is correct. Malony v. Adsit, 175 U. S., 281. Nor will a new and amended bill be allowed to be filed after the case has been argued, particularly where no good reason is shown why the original was not complete. Pittsburg Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed., 466. Nor can a bill be allowed nunc pro tunc after the term where control of the case has not been reserved by order or rule. Reader v. Haggin, 160 Fed., 909. But the pendency of a rule for a new trial extends the time within which to settle a bill. Kentucky Distilleries Co. v. Lillard, 160 Fed., 34.

(*b*) Where the case is tried to the Court without a jury and special findings are made, such special findings become part of the record, and their sufficiency to support the judgment may be determined without an exception and without a bill. Chicago, Rock Island & Pacific R. R. v. Barrett, 190 Fed., 118. But where there is a general finding and no bill of exceptions taken, the only question is whether the pleadings support the findings and judgment. Marinette Saw Mill Co. v.

Scofield, 174 Fed., 562. Fellman v. Royal Ins. Co., 185 Fed., 689. Jackson v. Mutual Life Ins. Co., 186 Fed., 447.

(*c*) The whole of the charge is not to be made the subject of a bill. Phoenix Life Ins. Co. v. Raddin, 120 U. S., 183. Block v. Darling, 140 U. S., 234. The rule is mandatory and cannot be disregarded by the trial judge. Price v. Pankhurst, 53 Fed., 312. The ground of an exception must be stated at the time in order that the Court shall have its attention directed to the error alleged to be committed and be able to correct it. Merchants Ins. Co. v. Buckner, 110 Fed., 345. Porter v. Buckley, 147 Fed., 140. Aetna Indemnity Co. v. Farmers' Nat. Bank, 169 Fed., 737, 745.

(*d*) The fact that exception was taken to the charge before the jury had retired must appear in the record in order to have the exception considered. Sheppard v. Wilson, 6 How., 260. Phelps v. Mayer, 15 How., 160. Mann v. Dempster, 179 Fed., 837. Star Co. v. Madden, 188 Fed., 910. This is not a mere formal or technical provision, but is in the interest of justice in order that there may be opportunity for correction if the Court is advised of the need of it, in time. Phelps v. Mayer, 15 How., 160. A rule of the trial court, which permits of exceptions to the charge after the jury have retired, against the settled policy of the Federal Courts, will be regarded as permitting this course only where it is in the interest of justice, and to avoid the confusing of the jury, or where instructions have been given in the absence of counsel. It will not be regarded as permitting exceptions to be generally taken in this manner. Montana Mining Co. v. St. Louis Mining & Milling Co., 147 Fed., 897. But where the Court permitted the jury to retire before the party had an opportunity to take exceptions, this action may be made the subject of a valid exception and ground for reversal. Mann v. Dempster, 179 Fed., 837. Berwind-White Coal Co. v. Firment, 170 Fed., 151. Western Union Tel. Co. v. Baker, 85 Fed., 690. In the absence also of a rule to the contrary it would seem to be enough that exceptions to the refusal of the Court to give instructions requested were noted at the trial in open court, even though it was after the jury had retired. Gandia v. Pettingill, 222 U. S., 452, 459.

(*e*) A general exception to the Court's instructions and to each and every part thereof is insufficient. Baggs v. Martin, 108 Fed., 33. Block v. Darling, 140 U. S., 234. Jones v. East Tennessee, &c. R. R., 157 U. S., 682. So also is an exception, to so much of the charge "as requires the evidence to show that there was an intention to deceive." Phoenix Assur. Co. v. Lucker, 77 Fed., 243; or to the charge of the Court, so far as the instructions are inconsistent with the request for rulings made. Partridge v. Boston & Maine R. R., 184 Fed., 211. Nor is a general exception to the charge, that it erroneously submitted the case under a Federal Statute which was not applicable, sufficient to sutain assignments based on the differences in liability between the state and the federal law. Erie R. R. v. Kennedy, 191 Fed., 332. A general exception also to the refusal of a series of instructions will not be considered if any one of them is sound. Beaver v. Taylor, 93 U. S., 46, 54. Thiede v. Utah, 159 U. S., 510, 520. Hodge v. Chicago & Alton Railway, 121 Fed., 48. Union Pacific R. R. v. Thomas, 152 Fed., 365. Nor can the refusal of a motion for a directed verdict be assigned for error unless the attention of the trial court is called to the grounds on which it was asked. Adams v. Shirk, 104 Fed., 54. O'Halloran v. McGuirk, 167 Fed., 493. Louis. & Nash. R. R. v. Womack, 173 Fed., 752, 759. Choctaw, Okla. & Gulf R. R. v. Jackson, 192, Fed., 792.

2. Exceptions to the admission or rejection of evidence shall be specific and not general (*a*), and the bill of exceptions to such admission or rejection shall contain only so much of the evidence admitted or offered and rejected as is necessary for the presentation and decision of the questions saved for review. Unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all of it shall not be allowed (*b*).

[S. C. Rule 4, Sect. 2. C. C. A. Rule 10, Sect. 2, in fourth and seventh circuits. There is apparently nothing to correspond with this rule in any of the other circuits.]

(*a*) Exceptions to the ruling of the trial court with respect to the reception or rejection of evidence are necessary in order to have the ruling reviewed. National Bank v. Schufelt, 145 Fed., 509. An exception to the admission of evidence will not be considered where it is general or fails to show the ground of the objection. Burton v. Driggs, 20 Wall., 125. Toplitz v. Hedden, 146 U. S., 252. Railroad Co. v. Hellenthal, 88 Fed., 116. Merchants' Ins. Co. v. Buckner, 110 Fed. 345. Davidson S. S. Co. v. United States, 142 Fed., 315. Erie R. R. v. Schomer, 171 Fed., 798. Pioneer S. S. Co. v. Jenkins, 189 Fed., 312. An objection to a question as "immaterial, incompetent and irrelevant" is not sufficient, as being too general. Shandrew v. Chicago, St. Paul & Milwaukee R. R., 142 Fed., 320. So a recital in a record, "excepted to, admitted, exception noted," does not show a proper and timely objection, following the answer to a question. Atlantic Coast Line v. Linstedt, 184 Fed., 36.

(*b*) Where a non-suit is entered or a judgment non obstante veredicto rendered on a point reserved under the Pennsylvania practice (Act April 22, 1905, P. L. (Pa.), 286), all of the evidence is necessarily involved and must therefore be contained in the bill of exceptions. An assignment that there was no evidence to support the judgment presents a question of law which can not be reviewed unless first passed upon by the trial court by some appropriate action. Keeley v. Ophir Hill Mining Co., 169 Fed., 598. Jackson v. Mutual Life Ins. Co., 186 Fed., 447.

RULE 11. ASSIGNMENTS OF ERROR (*a*).

1. The plaintiff in error or appellant shall file (*b*) with the clerk of the court below, with his petition for the writ of error or appeal, his assignments of error (*c*), as required by section 997 of the Revised Statutes, which shall set out separately and particularly each error asserted and intended to be urged (*d*). When the error alleged is to the admission or the rejection of evidence, the assignment shall quote the full substance of the evidence admitted or rejected (*e*); when the error alleged is to the charge of the court, the assignment shall set out the part referred to totidem verbis (*f*), whether it be in instructions given or in instructions refused; when the error

alleged is based on the trial court's refusal to enter a judgment non obstante veredicto (*g*) for the plaintiff in error on the whole record, the assignment shall state the reasons presented to the trial court for the entry of such judgment; when the error alleged is to a ruling upon the report of a master or referee, the assignment shall state the exception to the report and the action of the court upon it. Such assignments of error shall form part of the transcript of the record and be printed with it. When error is not so assigned, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded. The court, at its option, however, may notice a plain error not assigned (*h*).

[S. C. Rule 35, Sect 1. C. C. A. Rule 11 in force in substance in all the circuits.]

(*a*) Assignments of error are required both on appeal and writ of error. Randolph v. Allen, 73 Fed., 23; and in a bankruptcy appeal the same as any other. Flickinger v. First Nat. Bank, 145 Fed., 162. They are also required on an appeal in admiralty, even though the case to a certain extent is heard de novo. Cook v. Smith, 187 Fed., 538. The assignments should be entitled in the trial Court and not the Court of Appeals. Church Cooperage Co. v. Pinkney, 170 Fed., 266.

In preparing assignments of error the rules should be strictly observed. Walton v. Wild Goose Mining Co., 123 Fed., 209. An appeal may be dismissed for failure to comply with the rules with regard to assignments of error and briefs. Moline Trust Co. & Savings Bank v. Wylie, 149 Fed., 734. An assignment of error cannot be used to bring up questions which the record of the Court below does not show were raised. Canal & Claiborne St. R. R. v. Hart, 114 U. S., 654, 663. Neither will assignments of error be considered which are based on evidence not contained in the bill of exceptions although printed in the record. Lee Won Jeong v. United States, 145 Fed., 512. The verdict of a jury in an equity case being advisory merely, assignments of error based on the refusal of instructions will not be entertained. McKinley Mining Co. v. Alaska Mining Co., 183 U. S., 563. See further 2 Rose Fed. Proced., Sect. 1931 and notes.

(*b*) Assignments of error must be drawn up and filed. It is not enough to insert them in the briefs. Realty Co. v. Rudolph, 217 U. S., 547. Briscoe v. Rudolph, 221 U. S., 547. Stillwagon v. Balt. & Ohio R. R., 159 Fed., 97. Aetna Indemnity Co. v. Crowe Coal Co., 154 Fed., 545.

(*c*) The filing of an assignment of errors before or at the time of the allowance of a writ of error or appeal is indispensable under this rule; see also Rule 14, Sect. 6 infra; and where it is not so filed the writ of error or appeal will be dismissed. Dufour v. Lang, 54 Fed., 913. Simpson v. First Nat. Bank, 129 Fed., 257. Lockman v. Lang, 132 Fed., 1. An assignment of errors is filed with the petition, within the meaning of the rule, where the errors complained of are incorporated in the petition for appeal and the petition is then filed with the clerk. Central Trust Co. v. Continental Trust Co., 86 Fed., 517; or where they are filed at the same time with the petition and the order

allowing the appeal. Copper River Mining Co. v. McClellan, 138 Fed., 333.

The reasons for the rule are (1) that the opposing counsel and the appellate court may be informed of the questions to be discussed; and (2) where a writ of error is applied for, that the judge, who allows the writ may be advised whether it ought to issue. Simpson v. First Nat. Bank, 129 Fed., 257. The right to an appeal, however, is absolute and its allowance when applied for imperative, the only question to be considered being the sufficiency of the security offered. Pullman Palace-Car Co. v. Central Transportation Co., 71 Fed., 809. Simpson v. First Nat. Bank, 129 Fed., 257. No formal allowance of an appeal therefore is necessary, the acceptance of security and the issuing of a citation being enough. Sage v. Railroad Co., 96 U. S., 712. Hence the assignment of errors in case of an appeal is in time if filed before the security, by which the appeal is perfected, is approved. And where an appeal is allowed on condition that certain security be given, the filing of an assignment of errors at the same time with the filing of an approval of the required bond is a sufficient compliance with the rule. Simpson v. First Nat. Bank, 129 Fed., 257. Lockman v. Lang, 132 Fed., 1. Additional assignments after the appeal has been perfected by service of the citation form no part of the record and will not be considered. Mast v. Superior Drill Co., 154 Fed., 45. Cross assignments are not allowed. Rogers v. Penobscot Mining Co., 154 Fed., 606. O'Neil v. Wolcott Mining Co., 174 Fed., 527. Midland Valley R. R. v. Fulgham, 181 Fed., 91.

(*d*) An assignment that the court erred in refusing to charge as requested in certain numbered points does not comply with the rule. Empire State Cattle Co. v. Atchison, Topeka & Santa Fe R. R., 147 Fed., 457. Neither is an assignment sufficient, that the court erred in entering a decree for the appellee and in not sustaining a cross bill. The Myrtie M. Ross, 160 Fed., 19. Nor that the court erred in dismissing the bill, denying an injunction, and refusing an account. Walter Baker Co. v. Gray, 192 Fed., 921, 929. An assignment that there was no evidence to support the judgment presents a question of law which cannot be reviewed unless presented to and passed upon by the trial court. Keeley v. Ophir Hill Mining Co., 169 Fed., 598. Jackson v. Mutual Life Ins. Co., 186 Fed., 447. An action tried on one theory in the court below will not be allowed to be presented on another in the appellate court. Hatcher v. North Western Insurance Co., 184 Fed., 23. Bort v. McCutchen, 187 Fed., 798.

(*e*) Where the assignment is to the admission or rejection of evidence, the evidence received or the question or offer of evidence rejected must be incorporated in the assignment. Railroad Co. v. Smith, 21 Wall., 255, 261. Buckstaff v. Russell, 151 U. S., 626. A reference over to the bill of exceptions is not enough. Atlas Distilling Co. v. Rheinstrom, 86 Fed., 244. Gallot v. United States, 87 Fed., 446. An assignment that the Court erred in overruling defendant's offer of a certain letter from H. to G. without setting out the letter does not comply with the rule. Crosby v. Emerson, 142 Fed., 713. Nor is it sufficient to simply identify an exhibit by number. North Western Steam Boiler Co. v. Great Lake Engineering Works, 181 Fed., 38. In case of the exclusion of an answer to a particular question in a deposition the answer or the full substance of it must be set out. Shauer v. Alterton, 151 U. S., 607. Buckstaff v. Russell, 151 U. S., 626, 636. Where error is assigned to the refusal to admit evidence or allow a witness to answer questions, the evidence which it was proposed to introduce or which the questions were intended to elicit should be set

forth. United States v. Indian, &c. District, 85 Fed., 928. Turner v. United States, 66 Fed., 289. American Nat. Bank v. National Wall Paper Co., 77 Fed., 85. But where the question rejected is proper in form and apparently calculated to elicit evidence which is relevant to the issue or favorable to the party in whose behalf it is propounded, error may be assigned on its rejection without more. Buckstaff v. Russell, 151 U. S., 626, 636.

(*f*) Garrett v. Pope Motor Car Co., 168 Fed., 905.

(*g*) The practice with regard to entering judgment non obstante veredicto in accordance with the Pennsylvania Statute obtains in the Federal Courts of that State. Keiper v. Equitable Life Assur. Soc., 159 Fed., 206. Smith v. Jones, 181 Fed., 819. Cf. Missouri K. & T. R. R. v. Collier, 157 Fed., 347. But to entitle the party to a review, binding instructions must be asked. Philadelphia v. Bilyeu, 36 Pa. Super. Ct., 562. Missouri K. & T. R. R. v. Collier, 157 Fed., 347. And there must be an exception to the ruling of the Court entering judgment notwithstanding the verdict. Hatcher v. North Western Insurance Co., 184 Fed., 23. Where a judgment non obstante has been reversed the Court may grant a new trial instead of entering a final judgment. Western Bank Note Co. v. Slentz, 188 Fed., 57. Sloan v. Phila. & Read. R. R., 235 Pa., 155.

(*h*) The Court will not depart from the rule to notice a technical or immaterial error. Atchison, Topeka & Santa Fe R. R. v. Mulligan, 67 Fed., 569. National Acc. Soc. v. Spiro, 78 Fed., 774. The error must be convincing and controlling to be noticed when not assigned. Mast v. Superior Drill Co., 154 Fed., 45. But a palpable error, the correction of which is necessary to the administration of justice, will be noted without an assignment. Baltimore & Ohio R. R. v. McCune, 174 Fed., 991. A defect in jurisdiction, such as want of diversity of citizenship, which cannot be waived, will be noticed without an assignment; although not those which cannot be, such as a lack of proper service. Rogers v. Penobscot Mining Co., 154 Fed., 606. Morrison v. Burnette, Ibid, 617. Stillwagon v. Baltimore & Ohio R. R., 159 Fed., 97. Hare v. Birkenfield, 181 Fed., 825. So where the case is tried to the Court without a jury, whether a special finding is sufficient to support the judgment is of such controlling character that the Court will notice it, sua sponte. Chicago, Rock Island & Pacific R. R. v. Barrett, 190 Fed., 118.

RULE 12. OBJECTIONS TO EVIDENCE IN THE RECORD.

1. In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

[S. C. Rule 13. C. C. A. Rule 12, in force in the same form in all the circuits.]

Exceptions cannot be taken for the first time in the Court of Appeals to matters appearing in the record as sent up; such as depositions

(Mechanics' Bank v. Seton, 1 Pet., 299, 307. Howard v. Stillwell Mfg. Co., 139 U. S., 199, 205. San Pedro Canon Co. v. United States, 146 U. S., 120, 136); deeds (Mitchel v. United States, 9 Pet., 711); or the report of a master or referee (Canal Co. v. Gordon, 6 Wall., 561. Lumber Co. v. Buchtel, 101 U. S., 633). And the party as a rule will be confined to the objections made at the time. Hinde v. Longworth, 11 Wheat., 209. The objections also must be specific and not vague. Thomas v. Lawson, 21 How., 331, 337.

RULE 13. SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds (*a*) in the circuit and district courts must be taken, with good and sufficient security (*b*), that the plaintiff in error or appellant shall prosecute his writ or appeal to effect (*c*), and answer all damages and costs if he fail to make his plea good (*d*). Such indemnity where the judgment or decree is for the recovery of money (e) not otherwise secured (*f*), must be for the whole amount of the judgment or decree, including just damages for delay (*g*), and costs (*h*) and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions (*i*) and replevin, and in suits on mortgages (*j*), or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal (*k*).

[S. C. Rule 29. C. C. A. Rule 13, Sect. 1, in force in all the circuits. Supreme Court Rule 29, according to Kountze v. Omaha Hotel Co., 107 U. S. 378, 388, was formulated after the decision in Rubber Co. v. Goodyear, 6 Wall., 153.]

(*a*) 1. A supersedeas is a statutory and not a natural right, and is therefore obtained only upon strict compliance with the prescribed conditions. Sage v. Central R. R., 93 U. S., 412, 417. It operates only in favor of those parties who have applied for and obtained it. Ex parte French, 100 U. S., 1. A writ of error does not operate as a supersedeas unless a copy of the writ for the opposite party is filed in the clerk's office within sixty days after the entering of judgment, Sundays excluded. Act Feb. 18, 1875, 18 Stat., 318. Kitchen v. Randolph, 93 U. S., 86. Foster v. Kansas, 112 U. S., 201. And an appeal being subject to the same regulations (R. S. Sect. 1012), it must be perfected by the entry of security within the same period. Kitchen v. Randolph, 93 U. S., 86.

When the proper steps have been taken a writ of error or appeal operates as a supersedeas as a matter of law. Kitchen v. Randolph, 93 U. S., 86, 88. Goddard v. Ordway, 94 U. S., 672. Hovey v. McDonald, 109 U. S., 150, 160. The only function of the judge in that connec-

tion is to determine the amount and sufficiency of the security to be required. McCourt v. Singers-Bigger, 150 Fed., 102. But when such steps have not been taken it is beyond the power of the Appellate Court or of the court of first instance to give the writ of error or appeal the character of a superseadeas. Sage v. Central R. R., 93 U. S., 417. Peugh v. Davis, 110 U. S., 227. New England R. R. v. Hyde, 101 Fed., 397. Logan v. Goodwin, 101 Fed., 654. Robinson v. Furber, 189 Fed., 918. Nor can this be effected by a nunc pro tunc order, except where the delay was the act of the Court, and no injustice will be done. Sage v. Central R. R., 93 U. S., 417.

2. The sixty days within which the proper steps must be taken to make the writ of error or appeal a supersedeas is to be computed from the date of the judgment to be reviewed. Slaughter-House Cases, 10 Wall., 291. Wurts v. Hoagland, 105 U. S., 701. Sundays are excluded in the computation. Where therefore a decree was entered March 29, and the appeal bond was not approved until May 31, and not filed with the clerk until June 1, it was nevertheless in time. Danville v. Brown, 128 U. S., 503. And where the judgment or decree is that of the highest court of a State, and is required by the State law to be returned to a lower court for execution, the sixty days begin to run only from the return of the case to such lower court. Slaughter-House Cases, 10 Wall., 291. The time in any event is suspended, pending an application for a rehearing or a vacation or setting aside of the judgment or decree, whereby until disposed of, it does not take final form for the purpose of a writ of error or appeal. Kingman v. Western Mfg. Co., 170 U. S., 675. And where a first appeal fails by reason of the clerk not having sent up the record in season, and a second appeal is taken within the six months limited by the statute, the Court of Appeals may permit a supersedeas bond to be given after the expiration of sixty days from the rendition of judgment. Sutherland v. Pearce, 186 Fed., 787. But a stay granted for the purpose of affording opportunity to apply to the Supreme Court for a certiorari will not operate to extend the sixty days. Title, Guaranty & Surety Co. v. United States, 222, U. S., 401.

It is to be noted, however, with regard to the exclusion of Sundays, that this does not apply to the six months given by the statute within which a writ of error or appeal must be taken, so that if the last day falls on Sunday an appeal taken on Monday is too late. Johnson v. Meyers, 54 Fed., 417. Meyer v. Hot Springs Improvement Co., 169 Fed., 628.

3. In cases where a writ of error may be a supersedeas execution shall not issue until the expiration of ten days after the judgment has been entered. Act Feb. 18, 1875, 18 Stat., 318. And Sundays are excluded in the computation, the same as in the case of the sixty days within which to obtain a supersedeas. Danville v. Brown, 128 U. S., 503. Danielson v. Northwestern Fuel Co., 55 Fed., 49. This does not apply, however, to the judgment of a State Court. Doyle v. Wisconsin, 94 U. S., 50. The ten days begin to run from the date of the entry of judgment and not from when the same was signed by the judge. Commissioners v. Gorman, 19 Wall., 661. Where, however, a decision was announced, but before a decree could be entered, it had to be settled and signed by the Court, it is not until after that, that the time begins to run. Silsby v. Foote, 20 How. 290. But where a decree was entered dismissing the bill, the running of the time will not be deferred by mere delay in taxing up and entering a decree for the costs. Fowler v. Hamill, 139 U. S., 549.

Where the ten days have expired when execution issued, a supersedeas subsequently obtained only operates to stay proceedings from that time on. It cannot interfere with what has been already done. Commissioners v. Gorman, 19 Wall., 661.

(*b*) The security must be approved by the judge who fixed the amount required and signed the citation. Gay v. Hudson River Power Co., 190 Fed., 812, 820.

The right of the judge allowing the appeal to increase the bond after the jurisdiction of the appellate court has attached by its approval may be doubted. Butchers' Assoc. v. Slaughter House Co., 1 Woods, 50. But the order of approval may be annulled the next day after a supersedeas has been allowed, within the time when the court had a right to refuse or grant it, the security being found insufficient. Black v. Zacharie, 3 How., 483. So, too, while the case is still in the grasp of the court an order granting a supersedeas may be vacated. Timolat v. Philadelphia Pneumatic Tool Co., 130 Fed., 903. The appellate court may always be appealed to for the purpose of modifying the stay or increasing the bond when it is no longer sufficient. Rubber Co. v. Goodyear, 6 Wall., 153, 156. French v. Shoemaker, 12 Wall., 86, 99. Jerome v. McCarter, 21 Wall., 17, 31. Martin v. Hazard Powder Co., 93 U. S., 302. Williams v. Claflin, 103 U. S., 753. Harwood v. Dieckerhoff, 117 U. S., 200. Mexican Construction Co. v. Reusens, 118, U. S., 49, 53. But a motion to increase the amount of a supersedeas bond must be addressed to the appellate court and not to the court of first instance. Clarke v. Eureka Co. Bank, 131 Fed., 145.

(*c*) This means prosecuting the appeal with success. Commonweath v. Lenhart, 233 Pa., 526. Crane v. Buckley, 203 U. S., 441, 447. And where therefore the appellant succeeded in having the time within which payment should be made in order to prevent a foreclosure extended on appeal, the sureties on the appeal bond were not liable for use and occupation during the time for which it was so extended. Ibid. But the bail on appeal are liable for an unpaid fine, which the defendant was sentenced to pay in addition to imprisonment, even where after affirmance the defendant surrenders himself and goes to jail. Commonwealth v. Lenhart, 233 Pa., 526. The terms of the bail bond required on appeal in criminal cases as prescribed by Rule 15 infra, would seem to exonerate the sureties from payment of costs.

(*d*) If a writ of error is non-prossed for failure to justify, the bail are not liable. Tilden v. Worrell, 30 Pa., 272. But they are, where there is a non pros on any other grounds. Mechling v. Merchants' Bank, 3 Walker (Pa.), 466.

Where judgment is reversed on the writ of error on which the supersedeas bond in suit was given, the sureties do not become liable by an affirmance on a subsequent writ. Bank v. Cowperthwaite, 1 Wilcox (Pa.), 273.

(*e*) A judgment for the recovery of money is one which adjudges the defendant either individually or in a representative capacity to pay a specific sum. Fuller v. Aylesworth, 75 Fed., 694.

(*f*) A judgment is to be regarded as "otherwise secured" within the meaning of the rule, where, by reason of a lien on the property secured to the plaintiff otherwise than by the judgment, or by reason of the actual custody of property liable to satisfy the claims asserted, the court has the means of enforcing the judgment by subjecting specific property thereto. Louisville & Nashville R. R. v. Pope, 74 Fed., 1.

(*g*) An appeal bond operative as a supersedeas and conditioned as required by the rule covers not only the money decree appealed from, but also damages for the delay and costs. American Surety Co. v. North Packing Co., 178 Fed., 810. In a criminal case it covers the fine. Commonwealth v. Lenhart, 233 Pa., 526. But probably not the costs. See Rule 15, infra.

(*h*) The security required is security to answer all damages and costs. Hence the bond is not sufficient to effect a supersedeas where it contains no security for the costs. Seward v. Corneau, 102 U. S., 161. Deford v. Mehaffy, 13 Fed., 481. But an inadvertent variance by which the supersedeas bond is less by a few dollars than it should be, no objection being made at the time, will not overcome its effect. Clarke v. Eureka County Bank, 131 Fed., 145. The surety on an appeal bond is liable not only for the costs in the Court of Appeals, but also in the lower court. Expanded Metal Co. v. Bradford, 177 Fed., 604. Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed., 568. Young v. Daley, 185 Fed., 209.

(*i*) Whether on a writ of error in ejectment the bail are liable for mesne profits by way of damages, and the bond should therefore be sufficient to cover them in order to make the writ a supersedeas, is involved in controversy. It was held that they were not in Warren v. Steer, 118 Pa., 529, and Johnson v. Hessel, 134 Pa., 315. See also, Burgess v. Doble, 149 Mass., 256. But in Gardner v. Kiehl, 182 Pa., 194, 200, Warren v. Steer was spoken of as a much to be regretted decision; and in Gleeson's Est., 192 Pa., 279, it was squarely held that on a writ of error from the Supreme Court of Pennsylvania to the Supreme Court of the United States in an ejectment case, the obligors on the appeal bond were bound for all damages arising from the use and detention of the property pending the appeal, although not for repairs made. And a similar ruling as to the necessity for the bond covering the rent and mesne profits pending the appeal in order to have it operate as a supersedeas was made in St. Louis Smelting Co. v. Wyman, 22 Fed., 184. And see Tarpey v. Sharp, 12 Utah, 383, 390, 43 Pacif. Rep., 104; Lum v. Reed, 53 Miss., 71; Kirkland v. Trott, 75 Ala., 321; and Laurence v. Lippencott, 6 N. J. Law, 577. But on the other hand, in Roberts v. Cooper, 19 How., 373, which was an ejectment for a mine, where a bond of only one thousand dollars had been exacted, the Court refused to require additional security upon a showing by affidavit that the plaintiff would be damaged over $25,000. by reason of the delay sustained in the working of the mine. And in Ex parte French, 100 U. S., 1, the bond being ample to cover the mesne profits recovered, the court refused to order execution of the judgment because of the damage that might arise, as alleged, from a detention of the property pending the appeal.

(*j*) In an ordinary foreclosure suit an appeal bond does not operate in a Federal Court as security for the amount of the decree; nor for interest pending the appeal; nor for the balance due after applying the proceeds of the sale of the mortgaged premises; nor for the rents and profits, or the use and detention of the property pending the appeal; but only for the costs of the appeal, and the deterioration or waste of the property, and perhaps burdens accruing by non-payment of taxes, or loss by fire if not properly insured. Kountze v. Omaha Hotel Co., 107 U. S., 378. Supervisors v. Kennicott, 103 U. S., 554, 557. This, it is to be observed, is not the Pennsylvania rule. Smead v. Stuart, 194 Pa., 578. Koecker v. Fidelity Trust Co., 103 Pa., 331. But even there, security in double the amount of the judgment is not required where, by the terms of the mortgage, the lien and collection

of the judgment is restricted to the land. Hosie v. Gray, 73 Pa. 502. But on an appeal from an order confirming a foreclosure sale and directing the execution of a deed and the delivery of immediate possession to the purchaser, the surety on a supersedeas bond is liable for the value of the use and possession of the property for the time the purchaser is kept out of the same. Woodworth v. Northwest. Mutual Life Ins. Co., 185 U. S., 354. And where, after a decree of foreclosure of a chattel mortgage, possession of the property was obtained by the appellant pending an appeal, and it was destroyed by fire, the sureties on the appeal bond were held liable for the full value of the property. Perry v. Tacoma Mill Co., 152 Fed., 115.

(*k*) Parties who sign supersedeas, cost, or delivary bonds voluntarily connect themselves with the suit in such a manner as to be subject to the jurisdiction of the court in which the suit is pending, and to a summary judgment upon their undertaking, when the amount of their liability can be ascertained without an issue and trial. Egan v. Chicago & Great Western R. R., 163 Fed., 344. Cimiotti Unhairing Co. v. American Fur Refining Co., 158 Fed., 171. Commonwealth v. Fidelity & Deposit Co., 180 Fed., 292. Upon the discharge of the liability on a supersedeas bond the court may order the bond to be cancelled. Perry v. Tacoma Mill Co., 152 Fed., 115.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction (*a*) in a circuit or district court, the appellant shall, at the time of the allowance of said appeal (*b*), file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

[C. C. A. Rule 13, Section 2, substantially the same in all the circuits.]

(*a*) By Act March 3, 1911, Sect. 129, 36 Stat., 1134, an appeal may be taken from an order refusing, dissolving, or refusing to dissolve an injunction, the same as from the granting and continuing of one. This restores the law to what it was after the passage of the Act of Feb. 18, 1895, 28 Stat., 666.

(*b*) The allowance of a stay on an appeal from an order awarding an injunction is a matter of discretion and not of right. In re Haberman Mfg. Co., 147 U. S., 525. The effect of an injunction is not stayed by the mere granting of an appeal with a bond in the form of a supersedeas bond. Knox County v. Harshman, 132 U. S., 14. The court or judge allowing the appeal may suspend or modify the injunction pending it. Equity Rule 93. Leonard v. Land Co., 115 U. S., 465. New River Mineral Co. v. Seeley, 117 Fed., 981. See also Rule 14, Sect. 1, infra. Unless this is done the injunction retains its intrinsic force. Act March 3, 1911, Sect., 129, 36 Stat., 1134. Hovey v. McDonald, 109 U. S., 150, 162. The suspensive character given to the appeal at the time it is allowed cannot be recalled by the lower court, before the appeal is finally disposed of. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 161 Fed., 798. And this means until the mandate comes down. Durant v. Essex Co., 101 U. S., 555. A supersedeas secured at the time of the appeal continues in force pending a petition to the Supreme Court for a certiorari. Boston & Maine R. R. v. Gokey, 150 Fed., 686.

RULE 14. WRITS OF ERROR, APPEALS, RETURNS AND RECORDS (*a*).

1. Any appeal to this court, or writ of error from this court, allowable by law (*b*), may be allowed, in term time or vacation, by the circuit justice, or by any of the circuit judges within this circuit, or by any district judge within the district where the case to be reviewed was heard or tried, who may also take the proper security (*c*), sign the citation (*d*), and, if he deem it proper so to do, grant a supersedeas (*e*) and stay of execution (*f*) or of proceedings pending such writ of error or appeal.

[S. C. Rule 36, Section 1. No C. C. A. Rule to correspond except Rule 35, Sect. 1 in second circuit; and Rule 37, Sect. 1 of the sixth circuit; and see Act March 3, 1911, Sect. 132, 36 Stat., 1134.]

(*a*) For helpful suggestions with regard to the mode of taking an appeal or writ of error see 150 Fed. lxxiii; 2 Rose Fed., Proced., sects. 1923, 1972; 3 Foster's Fed. Prac., sects. 496, 511; and 2 Loveland Fed. Forms, p. 1684, et seq. Proceedings on appeal in the Federal Courts are governed by the Acts of Congress. The state practice under the conformity act affords little if any guide. Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co., 165 Fed., 162.

Parties on error or appeal. All parties against whom a joint judgment or decree is entered and who appear by the record to be interested must join in the writ of error or appeal. 3 Foster's Fed. Prac., 2054. 2 Rose Fed. Proced., Sect. 1916. Masterson v. Herndon, 10 Wall., 416. Davis v. Trust Co., 152 U. S., 590. Beardsley v. Arkansas &c. Railway, 158 U. S., 123. Lewis v. Sittel, 165 Fed., 157. Ibbs v. Archer, 185 Fed., 37. Ireton v. Pa. Co., 185 Fed., 84. Where this is not done it must appear that the party not joining was notified and failed or refused to do so. Hardee v. Wilson, 146 U. S., 179. Ibbs v. Archer, 185 Fed., 37. And where a general judgment is rendered against the original defendants and the sureties on a supersedeas bond; the judgment is joint and all must join in the writ of error unless there is a summons and severance. Lamon v. Speer Hardware Co., 190 Fed., 734. But if the appeal is allowed in open court there is no need for a summons and severance. McNulta v. West Chicago Park Commissioners, 99 Fed., 328. King v. Thompson, 110 Fed., 319. Neither is there, where a party has no real interest. Mercantile Co. v. Kanawha & Ohio R. R., 58 Fed., 6. And where all the parties are joined in the writ, the omission of some of them in the petition is immaterial. Fitzpatrick v. Graham, 119 Fed., 353. One of several defendants also may sue out a writ of error where his interest is separate. Winters v. United States, 207 U. S., 564. Alsop v. Conway, 188 Fed., 568.

So all parties to a suit, including intervenors, who would be injuriously affected by a reversal of the decree must be made respondents on the appeal. Wilson v. Kiesel, 164 U. S., 248. But not those who have no interest in maintaining or reversing it. Basket v. Hassell, 107 U. S., 602. Marchand v. Livandais, 127 U. S., 775. Amadeo v. Northern Assur. Co., 201 U. S., 194. A person may be an indispen-

sible party in the lower court and yet not be indispensible on appeal. Love v. Export Storage Co., 143 Fed., 1.

Time within which to appeal. A writ of error or appeal to the Circuit Court of Appeals must be taken within six months, and when more then six months intervene after the entry of judgment a court of error has no jurisdiction. Connecticut Fire Ins. Co. v. Oldendorff, 73 Fed., 88, 90. Condon v. Central Loan & Trust Co., Ibid, 907. Blaffer v. New Orleans Water Supply Co., 160 Fed., 389. The rule is strictly adhered to, and the fact that a writ of error was allowed within that time but not issued is not sufficient. Rutan v. Johnson, 130 Fed., 109. The time cannot be enlarged by agreement. Clark v. Doerr, 143 Fed., 960. In re Brown, 174 Fed., 339; nor by order of court. Stevens v. Clark, 62 Fed., 321; nor can the parties confer jurisdiction by a voluntary appearance. Dodson v. Fletcher, 79 Fed., 129; nor will the time be extended by motion to vacate the judgment after the time for taking the appeal has expired, where the motion brings nothing new into the record, and is merely in substance and effect an application for a reargument. United States v. Fidelity & Deposit Co., 155 Fed., 117. But the time does not begin to run until the entry of a final judgment. Marks v. Northern Pacific R. R., 76 Fed., 941. And hence where a petition for a rehearing is presented in season, or a motion for a new trial is duly made, the judgment is not final for the purpose of an appeal or writ of error until the petition or motion if entertained is disposed of. Kingman v. Western Mfg. Co., 170 U. S., 675, 678. Cherokee Nation v. Whitmire, 223 U. S., 108, 111. A petition for review in bankruptcy by analogy with an appeal should be taken within ten days, unless the circumstances justify a delay. Blanchard v. Ammons, 25 Amer. Bank. Rep., 590; 183 Fed., 556. And it is so prescribed by rule (Rule 38), in the second circuit. In re Brown, 23 Amer. Bank. Rep., 93; 174 Fed., 339. It must be taken in any event within six months. In re Groetzinger & Sons, 11 Amer. Bank. Rep., 467; 127 Fed., 124. Blanchard v. Ammons, 25 Amer. Bank. Rep., 590; 183 Fed., 556.

The six months is not extended by the fact that the last day falls on Sunday. Johnson v. Meyers, 54 Fed., 417. Meyer v. Hot Springs Improvement Co., 169 Fed., 628. But an appeal if taken in time may be perfected by the entry of a proper bond, notwithstanding the fact that the six months have expired. Blaffer v. New Orleans Water Supply Co., 160 Fed., 389. Nor is the failure to give bond for costs at the time of taking an appeal ground for dismissing it, provided the bond is filed within a reasonable time, and the appellee is not prejudiced by the delay. Corcoran v. Kostrometinoff, 164 Fed., 685. Herr v. St. Louis & Santa Fe R. R., 174 Fed., 938. And where a writ of error has been allowed and the citation duly issued and served, an informality in the bond will not affect the jurisdiction of the court. Smythe v. New Orleans Land Co., 184 Fed., 892.

(*b*) *What appeals allowable.* Where jurisdiction in the court below is in issue and is sustained, and a decision rendered in favor of the defendant on the merits, the question of jurisdiction may be reviewed by the Court of Appeals. Campbell v. Golden Cycle Mining Co., 141 Fed., 610. But not where the decision is in favor of the defendant on the question of jurisdiction, Ibid. So the Court of Appeals has jurisdiction and that of the Supreme Court is not exclusive, where the plaintiff's case, although a constitutional question is involved, depends not only on that, but on the proper construction of an Act of Congress. Harris v. Rosenberger, 145 Fed., 449. And generally the question of jurisdiction is reviewable by the Court of

Appeals when it is not the sole question determined. Meeker v. Lehigh Valley R. R., 183 Fed., 548. And a decree in an ancillary bill is appealable to the Court of Appeals even though it involves a constitutional question, the jurisdiction of that court being dependent on its jurisdiction over the original suit. Railroad Commission v. Worthington, 187 Fed., 965, 225 U. S., 101. But where jurisdiction depends entirely on whether a state law violates the Federal Constitution an appeal is to be taken to the Supreme Court, and not to the Court of Appeals. Paducah v. East Tenn. Tel. Co., 182 Fed., 625.

A motion for a new trial in an action at law is not a necessary preliminary to a writ of error, notwithstanding the State practice to that effect. Boatmen's Bank v. Trower, 181 Fed., 804. An appeal is a matter of right and may be denied only where no appeal whatever is allowed. Brown v. McConnell, 124 U. S., 489. Simpson v. First Nat. Bank, 129 Fed., 257. McCourt v. Singers-Bigger, 150 Fed., 102. And a second appeal lies where there were subsequent issues not adjudged upon the first one. McCourt v. Singers-Bigger, 150 Fed., 102. United States v. Camou, 184 U. S., 574. United States v. New York Indians, 173 U. S., 464, 472. Nor are appeals in equity and admiralty limited to cases where the amount in controversy exceeds $50. The Joseph B. Thomas, 148 Fed., 762. But there is no appeal from a decree simply for costs. Canter v. Insurance Co., 3 Pet., 307. Elastic Fabrics Co. v. Smith, 100 U. S., 110, 112. Russell v. Farley, 105 U. S., 433, 437. Paper-Bag Co. v. Nixon, Ibid, 766. DuBois v. Kirk, 158 U. S., 58, 67. Wright v. Gorman-Wright Co., 152 Fed., 408.

Where a new trial has been granted under a misconception, upon the idea that the verdict rendered was not possible under the pleadings, a writ of error is allowable to correct this mistake. James v. Evans, 149 Fed., 136. So also is it, upon the refusal of the Court to exercise its discretion, on a mistaken conception of its powers. Dwyer v. United States, 170 Fed., 160. The refusal of the lower court to consider a motion for a new trial made in time and sustained by evidence, showing proper grounds for it also may be reviewed and reversed. Mattox v. United States, 146 U. S., 140. Felton v. Spiro, 78 Fed., 576. Ogden v. United States, 112 Fed., 523. But to make the refusal error the application must involve something new and not passed upon at the trial. Gourdain v. United States, 154 Fed., 453.

An order requiring the production of books and papers at the trial is interlocutory and not final, and no writ of error therefore lies. Webster Coal and Coke Co. v. Cassatt, 207 U. S., 181. Penna. R. R. v. International Coal Mining Co., 156 Fed., 765. The same is true of a refusal of judgment for want of an affidavit of defense under the Pennsylvania practice. Shumaker v. Security Life & Annuity Co., 159 Fed., 112; or the sustaining of a demurrer to the plaintiff's statement, where nothing further is done. Morris v. Dunbar, 149 Fed., 406; or the refusal of an amendment to the pleadings, such refusal resting in the sound discretion of the Court. Stillwagon v. Baltimore & Ohio R. R., 159 Fed., 97.

But the judgment is none the less final, because the costs included in it have not been taxed. Allis-Chalmers Co. v. United States, 162 Fed., 679. There is nothing which can be revised on a petition of review in bankruptcy without either the evidence or an agreed state of facts, on which the order of the bankruptcy court is predicated. Hegner v. American Trust Co., 187 Fed., 599. The Court of Appeals is not required to make a finding of facts and conclusions of law under General Order in bankruptcy No. 36 in a case appealable to the

Supreme Court unless this has been requested before decision made. Crucible Steel Co. v. Holt, 174 Fed., 127.

(*c*) The bond to be effective as a supersedeas must be approved by the judge who signs the citation and fixes the amount. Gay v. Hudson River Power Co., 190 Fed., 812, 820.

(*d*) The citation may be signed by the District as well as the Circuit Judge. Brown v. McConnell, 124 U. S., 489. Rodd v. Heartt, 17 Wall., 354. Richards v. Mackall, 113 U. S., 539. Huntington v. Laidley, 176 U. S., 668, 677. But where a writ of error runs to a State Court, the citation is to be signed by a Justice of the United States Supreme Court, or by the Chief Justice, Judge or Chancellor of the State Court which rendered the decision. Rev. Stat., 999. Bartemeyer v. Iowa, 14 Wall., 26. It cannot be signed by an Associate Justice except as it appears that he was acting as Chief Justice pro tem. Butler v. Gage, 138 U. S., 52, 56. Havnor v. New York, 170 U. S., 408. Missouri Valley Land Co. v. Wiese, 208 U. S., 234.

When an appeal is taken in open Court it is taken against all adverse interests, and all parties being present in contemplation of law are affected with notice, and no citation is necessary. Railroad Company v. Blair, 100 U. S. 661. Taylor v. Lessnitzer, 220 U. S., 90. Williams v. City Bank, 186 Fed., 419. But notice is required when the appeal is otherwise taken. Dodge v. Knowles, 114 U. S., 430, 438. Hewitt v. Filbert, 116 U. S., 142. Richardson v. Green, 130 U. S., 104, 114. And it is always required in case of a writ of error. United States v. Phillips, 121 U. S., 254; unless there is a waiver or the equivalent. Villabolos v. United States, 6 How., 81, 90. Goodwin v. Fox, 120 U. S., 775.

(*e*) See Rule 13 and the citations under it.

(*f*) After the jurisdiction of the appellate court has attached, applications for a stay, or to vacate or modify one which has been granted must be made to the appellate and not the lower court. Butchers Assoc. v. Slaughter House Co., 1 Woods, 50. Rubber Co. v. Goodyear, 6 Wall., 153, 156. French v. Shoemaker, 12 Wall., 86, 99. Jerome v. McCarter, 21 Wall., 17, 31. Martin v. Hazard Powder Co., 93 U. S., 302. Williams v. Claflin, 103 U. S., 753. Harwood v. Dieckerhoff, 117 U. S., 200. Mexican Construction Co. v. Reusens, 118 U. S., 49, 53. The application must be made to the Court itself and not to a single judge. In re Ironclad Mfg. Co., 190 Fed., 320. But when the case has been sent down by mandate to the lower Court, if there is occasion for a stay it is to be asked for there. Bost. & Maine R. R. v. Gokey, 150 Fed., 686.

2. The clerk of the court to which any writ of error may be directed, or from which any appeal may be taken, upon being paid or tendered his fees therefor (*a*), shall make a return of the same (*b*) by transmitting a true copy of the record (*c*), bill of exceptions (*d*), assignment of errors (*e*), and all proceedings in the case (*f*), under his hand and the seal of the court (*g*).

[S. C. Rule 8, Sect. 1. C. C. A. Rule 14, Sect. 1, in force in substance in all the circuits. In the Supreme Court and in the seventh circuit there is an additional provision that "the clerk may require of the appellant or plaintiff in error a written

praecipe stating in detail what the transcript shall contain, and when a praecipe is filed shall insert a copy thereof in the transcript."]

(*a*) A writ of error or appeal cannot be prosecuted in forma pauperis. Bradford v. Southern Railway, 195 U. S., 243. Taylor v. Adams Express Co., 164 Fed., 616. Herman Keck Mfg. Co. v. Lorsch, 179 Fed., 485. The George Hill, 192 Fed., 1022. And this extends to the printing of the record, which cannot be dispensed with. In re Bradford's Petition, 139 Fed., 518. But the bond for costs in an admiralty case will under some circumstances be dispensed with, and a typewritten instead of a printed copy of the record be accepted. The George Hill, 192 Fed., 1022. As the law stood prior to the Act of February 13, 1911, 36 Stat., 901, the clerk was entitled to fifteen cents a folio for making up and certifying the record. Rev. Stat. Sect. 828. McIlwaine v. Ellington, 99 Fed., 133. Mohrstadt v. Mutual Life Ins. Co., 145 Fed., 751. Hoysradt v. D. L. & W. R. R., 182 Fed., 880. 9 Compt. Decisions, 285. But in Cavender v. Cavender, 10 Fed., 828, it is held that the proper fee is ten cents. The clerk is entitled to his fees in advance. Steever v. Rickman, 109 U. S., 74. Bean v. Patterson, 110 U. S., 401. Cavender v. Cavender, 10 Fed., 828. Hoysradt v. D. L. & W. R. R., 182 Fed., 880. But he has no right, as a condition to certifying and transmitting the record, to demand payment of the costs which accrued prior to the appeal. Jennings v. Johnson, 148 Fed., 337.

By Act of February 13, 1911, Sect. 1, 36 Stat., 901, however, which was passed to diminish the expenses of proceedings on appeals and writs of error, it is in substance provided, that the appellant or plaintiff in error shall cause to be printed under such rules as the lower Court shall prescribe and shall file in the office of the clerk of the Circuit Court of Appeals at least twenty-five days before the case is called for argument twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs, as the rules of the Court of Appeals may prescribe in such form as the Supreme Court may by rule require, one of which printed transcripts shall be certified under the hand of the clerk and the seal of the court. But except where the case is carried from the Court of Appeals to the Supreme Court, which is provided for in the second section, not here noted, there seems to be no change as to the fees to be charged by the clerk of the District Court. As to the fees of the clerk of the Court of Appeals for supervising and indexing, see Colt's Mfg. Co. v. New York Goods Co., 186 Fed., 625.

(*b*) The original writ of error should be returned to the appellate court with a transcript of the record attached. Rev. Stat., Sect. 997. Massina v. Cavazos, 6 Wall., 355. The destruction of the original will excuse its return if a copy is attached to the transcript. Ibid. And where by mistake a copy of the writ was annexed to the transcript, instead of the original, but the original was produced with the citation, and an acknowledgment of service duly certified thereon, it was held to be sufficient. Burnham v. Railway Co., 87 Fed., 168.

(*c*) No absolute rule can be laid down as to what the record should or should not contain, but the instructions issued by the clerk of the Circuit Court of Appeals of the fourth circuit with regard to the preparation of the transcript will be found to be of value. 2 Rose Fed. Proced., 1956. 150 Fed., lxxiv. The second admiralty rule has also been suggested as a guide. Railway Co. v. Stewart, 95 U. S., 279. Irrelevant and useless matter which only cumbers the case and in-

creases the costs, should clearly be eliminated. Ibid. And costs may be imposed where this is not observed. Ball & Socket Co. v. Kraetzer, 150 U. S., 111, 118. Where the case has been disposed of on demurrer to the bill it is not necessary to include the evidence. Missouri, Kansas & Texas R. R. v. Dinsmore, 108 U. S., 30. And where there has been a previous appeal, matters preceding the mandate should be omitted. Supervisors v. Kennicott, 94 U. S., 498. Union Pacific R. R. v. United States, 116 U. S., 402. Nashua & Lowell R. R. v. Bost. & Lowell R. R., 61 Fed., 237, 243. But an original and a cross bill should be included as they constitute one suit. Gregory v. Pike, 64 Fed., 415. Ex parte Railroad Co., 95 U. S., 221, 225. When both parties appeal one transcript is enough. Rev. Stat., Sect. 1013.

(*d*) See Rule 10 and notes. supra.

(*e*) See Rule 11 and notes. supra.

(*f*) The clerk may refuse to certify a transcript where there are palpable and substantial omissions. Nashua & Lowell R. R. v. Bost. & Lowell R. R., 61 Fed., 237, 243. The attorney for the appellant in case of doubt may be called on by the clerk to indicate by praecipe what the record should contain. Burnham v. Railway, 87 Fed., 168. Penna. Co. v. Railway, 55 Fed., 131. The rules expressly provide for this in the seventh circuit. Where the clerk is requested to insert a matter by one party and to leave it out by another the Court below may be appealed to to direct what shall be done. Hoe v. Kahler, 27 Fed., 145. As to the right of counsel to stipulate what shall be included in the transcript, see Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Fed., 267. Where by stipulation or praecipe less than the whole record is sent up, the certificate should show it. Meyer v. Mansur Implement Co., 85 Fed., 874. Cunningham v. German Ins. Bank, 103 Fed., 932.

(*g*) For form of authentication, see 2 Loveland's Fed. Forms. Nos. 1465-1469. The record is authenticated by annexing a transcript to the writ of error and returning it under the seal of the court duly certified by the clerk or his deputy. Worcester v. Georgia, 6 Pet., 515. Blitz v. Brown, 7 Wall., 693. Garneau v. Dozier, 100 U. S., 7. Where the clerk by mistake has failed to sign the certificate, the appellate court may allow his signature to be added. Idaho Improvement Co. v. Bradbury, 132 U. S., 509. A defect in the authentication will not defeat jurisdiction. Burnham v. North Chicago R. R., 87 Fed., 168. If the clerk refuses to certify he may be compelled by mandamus or rule. United States v. Booth, 18 How., 476. United States v. Gomez, 3 Wall., 752, 766.

3. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

[S. C. Rule 8, Sect. 2. C. C. A. Rule 14, Sect. 2, in force in substance in all the circuits.]

The opinion of the Court in an action at law is no part of the record, even where required by rule of Court to be transmitted with it. England v. Gebhardt, 112 U. S., 502, 506. But the case is different in equity where the reasons given for a decision may be looked to to determine the scope of it. Russell v. Russell, 129 Fed., 434. Larkins

v. Lindsay, 205 Pa., 534. So on error to a state court where by statute the opinion of the court is required to be spread on the record, it is examinable upon error to ascertain the questions decided. Gross v. United States Mfg. Co., 108 U. S., 477. Crossley v. New Orleans, 108 U. S., 105. Egan v. Hart, 165 U. S., 188. Adams v. Burlington R. R., 112 U. S., 123, 129. But for a proper understanding of the rulings of the lower court the opinion should always be included. Teller v. United States, 111 Fed., 119.

4. No case will be heard until a complete record (*a*), containing in itself, and not by reference, all the papers (*b*), exhibits, depositions (*c*), and other proceedings, which are necessary to the hearing in this court, shall be filed.

[S. C. Rule 8, Sect. 3. C. C. A. Rule 14, Sect. 3, in force in substance in all the circuits except the fourth which has a substitute. 193 Fed. viii.]

(*a*) As to what should go into the transcript in order to make a complete record, see notes to Sect. 3 of this rule. It is the duty of the appellant to see that the record is complete. Redfield v. Parks, 130 U. S., 623. Dalton v. Moore, 141 Fed., 311. And the appeal may be dismissed where it is not. Railroad Co. v. Schutte, 100 U. S., 644. A certiorari may be sued out to bring up what is omitted. Redfield v. Parks, 130 U. S., 623. American Construction Co. v. Jacksonville R. R., 148 U. S., 372, 380. Flickinger v. Bank, 145 Fed., 162. Where by stipulation or praecipe less than the whole record is sent up the certificate should show it. Meyer v. Mansur Implement Co., 85 Fed., 874. Cunningham v. German Ins. Bank, 103 Fed., 932.

(*b*) The mere fact that a paper is found among the files does not make it a part of the record. Rio Grande Irr. Co. v. Gildersleeve, 174 U. S., 603, 608.

(*c*) Affidavits and depositions do not become a part of the record even though they appear in the transcript, unless they are made so in some appropriate manner. Baltimore & Potomac R. R. v. Trustees, 91 U. S., 127. Stewart v. Wyoming Ranche Co., 128 U. S., 383. Evans v. Stettnisch, 149 U. S., 605.

5. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

[S. C. Rule 8, Sect. 4. C. C. A. Rule 14, Sect. 4, in force in all the circuits.]

This is the rule in admiralty by express statute. Rev. Stat., Sect. 698. It is also now provided by statute in all cases. Act Feb. 13, 1911. 36 Stat., 901.

Original papers are not to be incorporated into the record merely to save the expense of copies. This is not justified by the rule.

Dowagiac Mfg. Co. v. Brennan, 156 Fed., 213. Nor will original books and papers be transmitted in the absence of a showing that transcribed or photographic copies will not answer. Herman Keck Mfg. Co. v. Lorsch, 179 Fed., 485. The rule is to be confined to such papers as require actual inspection as originals in order to give them full effect in the determination of the case. Craig v. Smith, 100 U. S., 232. Hence original affidavits of the authenticity of which there is no question are not to be sent up. Ibid. But where exhibits used in the trial court are treated by both parties as before the court on appeal, any informality in the way they got there will be disregarded. Wilson v. Chicago Lumber Co., 143 Fed., 705.

6. All appeals, writs of error (*a*), and citations (*b*) must be made returnable not exceeding thirty (*c*) days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served (*d*) before the return day (*e*); but the citation must be signed, and the bond for costs must be approved and filed (*f*), and the assignments of error submitted and filed, with the petition for the appeal or writ of error, immediately after the appeal or writ of error is allowed; provided, however, that every appeal taken from an interlocutory decree, under the seventh section of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and amendments to said section, shall be made returnable in ten days (*g*) from the allowance of the appeal and the signing of the citation.

[S. C. Rule 8, Sect. 5. C. C. A. Rule 14, Sect. 5, in force in simpler form in all the circuits except the seventh, where it is substantially as above.]

(*a*) Writs of error may be issued as well by the clerk of the District Court as by the clerk of the Court of Appeals. Rev. Stat., Sect. 1004. Act January 22, 1912, 37 Stat., Massina v. Cavazos, 6 Wall., 355, 357. Northern Pacific R. R. v. Amato, 49 Fed., 881. Sheppard v. Wilson, 5 How., 211. The parties should be correctly described in the writ as they are to appear and be styled in the appellate court, as well as the way they appear in the court below. Massina v. Cavazos, 6 Wall., 355, 361. But that they are designated as plaintiff and defendant, following their position in the court below, while a clerical error does not affect the right to prosecute the proceedings. Hackfeld v. United States, 141 Fed., 9.

(*b*) A citation is a summons to the opposite party to appear. Villabolos v. United States, 6 How., 81, 90. It is intended in case of an appeal as notice that the appeal has been taken and will be prosecuted. Dodge v. Knowles, 114 U. S., 430, 438. Where an appeal is allowed in open court, at the term at which the decree is entered, a citation is not necessary, the allowance of the appeal being sufficient notice. Railroad v. Blair, 100 U. S., 661. Taylor v. Lessnitzer, 220 U. S., 90. Williams v. City Bank, 186 Fed., 419. But if the appeal is taken out

of court, or after the term, the citation should issue, it being necessary in order to show that the appeal or writ of error has not been abandoned. Dodge v. Knowles, 114 U. S., 430, 438. Hewitt v. Filbert, 116 U. S., 142. Richardson v. Green, 130 U. S., 104, 114. No citation would seem to be necessary in an appeal in bankruptcy. In re Hill & Co., 148 Fed., 832.

But a citation is essential where a writ of error is taken, and where none has been issued, and the defendant in error fails to appear, the writ will be dismissed. Notice in open court at the time the judgment was rendered is not sufficient, there being a difference in this respect between a writ of error and an appeal. United States v. Phillips, 121 U. S., 254. A citation, however, may be waived, and a general appearance constitutes such a waiver. Villabolos v. United States, 6 How., 81, 90; and so does the acceptance of service of a defective citation. Bigler v. Waller, 12 Wall., 142; or whatever is equivalent to the acknowledgment of notice. Goodwin v. Fox, 120 U. S., 775.

(*c*) In the fourth circuit it is forty, and in the eighth it is sixty days. 193 Fed., ix. 188 Fed., xi. The requirement that writs of error and citations shall be made returnable and transcript be filed not exceeding thirty days from the date of the citation is directory and not jurisdictional, and an appeal will not be dismissed for noncompliance therewith. Love v. Busch, 142 Fed., 429. Nome & Sinook Co. v. Ames Mercantile Co., 187 Fed., 928. Nor will the cast be dismissed because the citation did not issue until after the time limited for the appeal. Nome & Sinook Co. v. Ames Mercantile Co., 187 Fed., 928. And where a defective citation is issued an alias may issue if required. Ibid.

(*d*) Personal service of the citation on the party cited or his attorney is requisite in the absence of an equivalent notice, or of a waiver. Dayton v. Lash, 94 U. S., 112. Hewitt v. Filbert, 116 U. S., 142. Service by mail is not sufficient. Tripp v. Santa Rosa Street Railroad, 144 U. S., 126. It seems to be otherwise with regard to service of a brief. Russo-Chinese Bank v. National Bank of Commerce, 187 Fed., 80. Where the citation on its face runs to all parties, but is not served on some who are essential to the appeal, who are not brought into court, and do not appear, the want of service is fatal. Davis v. Mercantile Trust Co., 152 U. S., 595.

(*e*) The citation should be served before the return day, but the failure to do so will not bring about a dismissal. Railroad v. Blair, 100 U. S., 661. Richards v. Mackall, 113 U. S., 539, 542. Nor does it have to be served thirty days before the time to which the writ of error is returnable. All that is required is that the defendant in error shall have thirty days notice before being compelled to go to a hearing. National Bank v. Bank of Commerce, 99 U. S., 608. Sutherland v. Pearce, 186 Fed., 783. A new or alias citation may issue when necessary. Dayton v. Lash, 94 U. S., 112. Sutherland v. Pearce, 186 Fed., 783. Nome & Sinook Co. v. Ames Mercantile Co., 187 Fed., 928. And where a writ of error has been seasonably taken and returned, an alias to bring in parties not previously served may issue even though the time within which the writ was to be taken has expired. Altenberg v. Grant, 83 Fed., 980. But an alias citation cannot issue after the term at which the appeal has been docketed. Hewitt v. Filbert, 116 U. S., 142. And where an appeal in admiralty was taken within six months, but the citation was not served on parties entitled to be heard in opposition thereto, and the record was not filed by the time required by the rules, nor until nearly a year after the appeal had been

allowed, a citation to bring in requisite parties at that time was refused. Hudson v. Limestone Natural Gas. Co., 144 Fed., 952.

(*f*) An appeal if taken in time may be perfected by the entry of a proper bond, notwithstanding the expiration of the six months within which it must be taken. Blaffer v. New Orleans Water Supply Co., 160 Fed., 389. Nor is the failure to give bond for costs at the time of taking the appeal ground for dismissal, provided it is filed within a reasonable time and the appellee is not prejudiced by the delay. Corcoran v. Kostrometinoff, 164 Fed., 685. Herr v. St. Louis & Santa Fe R. R., 174 Fed., 938. And where a writ of error has been allowed and citation duly issued and served, an informality in the bond will not affect the jurisdiction of the court. Smythe v. New Orleans Land Co., 184 Fed., 892.

(*g*) This limitation is also found in the rules of the fifth but not in the other circuits. 150 Fed., lxxix. An appeal from the refusing, dissolving or refusing to dissolve an injunction or appointing a receiver being now also allowed (Act March 3, 1911, Sect. 129, 36 Stat., 1134), the same limitation by analogy would probably be applied.

7. The records in cases of admiralty and maritime jurisdiction shall be made up in the same manner, as nearly as practicable, as are the records in equity cases.

[S. C. Rule 8, Sect. 6. C. C. A. Rule 14, Sect. 6.]

There are special rules as to appeals in admiralty in the first, second and ninth circuits; 150 Fed., xl. Ibid. lv-lx. Ibid. cxxxv-cxxxviii; and instructions issued by the clerk, approved by the court, and having the effect of a rule, in the fourth circuit. 150 Fed., lxxiii-lxxvi; and a special rule 35 as to additional testimony in admiralty appeals in the sixth circuit. 150 Fed., xcvi. The general rule however prevailing in all is that the record in admiralty cases shall be made up as provided in Supreme Court Admiralty Rule 52. 2 Rose Fed. Proced., Sect. 1963. By Rev. Stat., Sect. 698: "Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court; provided that either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record or in lieu of a copy of a part thereof." The record "directed by law to be made," which is here referred to, is the final record prescribed by Rev. Stat., Sect. 750; the distinction being recognized between that which constitutes the final record, and that which may be made part of the record for the purpose of appeal. In re Cooper, 143 U. S., 472, 507. These provisions are applicable to the Courts of Appeal, the same as to the Supreme Court. Act March 3, 1891, Sect. 11. 26 Stat., 829. The Philadelphian, 60 Fed., 427. Proofs intended to be used on appeal should be reduced to writing and filed, and without this the Court of Appeals may refuse to consider them. The Philadelphian, 60 Fed., 427. The Boston, 1 Sumner, 328. Where the testimony is objected to and ruled out, it should still be returned. Blease v. Garlington, 92 U. S., 1, 7. The evidence in an admiralty case will not be considered, although included in the transcript unless made a part of the bill of exceptions. The Wyandotte, 145 Fed., 321.

RULE 15. BAIL IN ERROR (In Criminal Cases).

1. Where a writ of error has been allowed in a criminal case, the justice or judge who allowed the writ, or any judge of the court which entered the judgment to be reviewed, shall have power to admit the plaintiff in error to bail for his appearance in such court on the determination of the proceedings on the writ of error to abide by and obey any order that may be made therein. The bond or recognizance for such appearance shall be substantially in the following form:

"United States of America, }
.....District of..... } ss.

We (here insert name of defendant), residing at..... and (here insert the name of surety), residing at....., in the State of....., acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of.....dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition: That if the said....., the defendant, upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals for the Third Circuit and is now pending, shall be and appear at the District Court of the United States for the.....district of..... .....upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or, within five days thereafter, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

....(L. S.)

.....(L. S.)

.....(L. S.)"

Taken, acknowledged and subscribed, this ..... day of .....A. D., 191.., in open court.

.....

Clerk of District Court.

[S. C. Rule 36, Sect. 2. C. C. A. Rule 35, in first, second and eighth circuits; and Rule 37 in fifth and sixth. No corresponding rule in fourth, seventh or ninth.]

The questions discussed and disposed of in re Claasen, 140 U. S., 200 form the basis of this rule. See also Hudson v. Parker, 156 U. S., 277. Ballew v. United States, 160 U. S., 187. There is abundant authority for a rule of this character. McKnight v. United States, 113 Fed., 451.

The defendant may at any time be arrested by his bail and surrendered to the Marshal. Rev. Stat. Sect. 1018. And this may be done wherever he is found, by the bail in person or by agent, and with or without process; it being the same as the arrest by the sheriff of an escaping prisoner. Taylor v. Taintor, 16 Wall., 366. Where the defendant is surrendered in this way an entry of it should be made on the record. United States v. Stevens, 16 Fed., 101. Where the defendant is about to abscond and his bail is insufficient he may be required to give better security. Rev. Stat., Sect. 1019. United States v. Ebbs, 49 Fed., 151. Where the defendant defaults, and his recognizance is forfeited, the bail have no action against the defendant for the amount of the recognizance in the absence of express agreement, nor are they entitled to be subrogated to the rights of the Government. United States v. Ryder, 110 U. S., 739. Where the recognizance has been duly forfeited the Government has a perfect cause of action against the bail in the proper forum, after due notice. Kirk v. United States, 124 Fed., 324. 137 Fed., 753. But it cannot proceed on two nihils in the district where the bail was given, the surety having his residence in another. Ibid.

Nothing can be recovered on the bail bond, but the penalty and costs. United States v. Broadhead, 127 U. S., 212.

The bail is not discharged by the arrest and detention of the defendant in another jurisdiction. United States v. Marrin, 170 Fed., 476. Taylor v. Taintor, 16 Wall., 371. But an agreement to continue the case indefinitely discharges the bail. Reese v. United States, 9 Wall., 13. And so does an agreement postponing the defendant's appearance. United States v. Backland, 33 Fed., 156; or allowing him to leave the country. Reese v. United States, 9 Wall., 13.

The failure of the defendant to pay the fine imposed on an affirmance of the sentence is a breach of the bond. Commonwealth v. Lenhart, 233 Pa., 526. This may not be true as to non-payment of the costs, in view of the terms of the bond as given above.

RULE 16. TRANSLATIONS.

1. Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand

it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

[S. C. Rule 11. C. C. A. Rule 15, in force in all the circuits.]

A true translation of a document is the putting into English of that which is the exact effect of the words used under the circumstances. Chatenay v. Brazilian Submarine Co., 1 Q. B. (1891), 79, 82.

Where pleadings, documents, or depositions are in a foreign language they should be accompanied by a sworn translation before they are filed. Simmonds v. DuBarre, 3 Bro. C. C., 263. Lord Belmore v. Anderson, 4 Bro., C. C. 90. It is no objection to the depositions that they were taken in English before foreign Commissioners who were not assisted by a sworn interpreter. Gilpins v. Consequa, 1 Pet., C. C., 85. Amory v. Fellowes, 5 Mass., 219. Where the correctness of a translation is disputed by a witness whose depositions are being taken, the question is for the Court when the case comes up. Foster v. Gladstone, 12 W. R., 525. Where an interpreter is used the depositions must be taken down as the testimony of the witness is translated by him. Euberweg v. La Compagnie Genl. Transatlantique, 35 Fed., 530. A deposition taken and returned in a foreign language may be translated into English before or at the trial. 13 Cycl., 983.

RULE 17. FILING RECORDS, DOCKETING CASES AND ENTERING APPEARANCES.

1. The plaintiff in error or appellant shall file the record of the case and cause it to be docketed by the clerk (*a*) of this court on or before the return day of the citation (*b*), whether in vacation or in term time; but for good cause shown (*c*) the justice or judge who signed the citation, or any circuit or district judge (*d*), may extend the return day (*e*) thereof, the order for extension to be filed with the clerk of this court.

[S. C. Rule 9, Sect. 1, clause 1. C. C. A. Rule 16, Sect. 1, clause 1, in force with variations in all the circuits.]

(*a*) It is the return and the depositing of the record in the clerk's office that keeps alive the jurisdiction of the appellate court. Credit Co. v. Arkansas Central Railway, 128 U. S., 258. Caillot v. Deetken, 113 U. S., 215. Hewitt v. Filbert, 116 U. S., 142. Hill v. Chicago & Evanston R. R., 129 U. S., 170, 174. Evans v. State Bank, 134 U. S., 330. Green v. Elbert, 137 U. S., 615. Where therefore no return of the transcript has been made, either before or during the term next succeeding the allowance of the writ of error or appeal, the appellate court acquires no jurisdiction, and the case must be dismissed. Hill v. Chicago & Evanston R. R., 129 U. S., 170. Wauton v. DeWolf, 142 U. S., 138. Jacobs v. George, 150 U. S., 415. But where there has been such a return, the docketing of the case after that is a mere matter of procedure and may be allowed after the term, provided the cause in the meantime has not been docketed and dismissed. Edwards v. United States, 102 U. S., 575. Green v. Elbert, 137 U. S., 615, 621.

The record, in other words, is in season if filed at any time during the return term, provided there has been no previous motion to dismiss. Nashua & Lowell R. R. v. Boston & Lowell R. R., 61 Fed., 237. It does not matter that the mere return day has passed. Andrews v. Thum, 64 Fed., 149. West Chicago R. R. v. Ellsworth, 77 Fed., 664.

(*b*) A citation is to be made returnable not exceeding thirty days from the day of signing it. Rule 14, Sect. 6, supra. The case should therefore be docketed and the record filed by that time, in order to keep within the above rule.

(*c*) The rules with regard to the return day and the filing of the transcript on or before that date are directory, and it is within the sound discretion of the court to relieve a party who has not complied therewith. Florida v. Charlotte, &c. Co., 70 Fed., 883. Thus a dismissal has been refused where the transcript was a day late, an effort having been made to file it the day before, but the clerk's office not being open. Farmers &c. Co. v. Chicago &c. R. R., 73 Fed., 314; or where there has been a confusion between the return day of the citation and of the writ. Town of Gilman v. Fernald, 141 Fed., 940; or where the failure to file has been due to the fraud of the opposite party; or to an order of the lower court; or to the contumacy of the clerk. Ableman v. Booth, 21 How., 506. United States v. Gomez, 3 Wall., 752. Grigsby v. Purcell, 99 U. S., 505. Green v. Elbert, 137 U. S., 615, 621. Even where the appellant delayed so long in filing the record that it was impossible for him to file and furnish the opposite party with printed copies and briefs, there is no ground for dismissing the appeal if the record has been filed in time. Jones v. Mann, 72 Fed., 85.

(*d*) Quaere; whether the time for filing the record can be extended by a district judge, who is not at the time an actual member of the court of appeals. West v. Irwin, 54 Fed., 419.

(*e*) An order extending the filing of the record made after the time has expired is ineffective. In re Alden Electric Co., 123 Fed., 415.

2. If the plaintiff in error or appellant shall fail to comply with the first section of this rule the defendant in error or appellee may cause the case to be docketed without the filing of any record and have it dismissed (*a*), whether in term time or vacation, upon due proof of notice (*b*) to the plaintiff in error or appellant of a motion for such dismissal, and upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation (*c*), and that the writ of error or appeal was duly sued out or allowed; and in no case shall the plaintiff in error or appellant be entitled to file the record or to have it docketed after the defendant in error or appellee shall have had the case dismissed under this section of this rule, unless upon special order of the court (*d*).

[S. C. Rule 9, Sect. 1, clause 2. C. C. A. Rule 16, Sect. 1, clause 2, in force in substance in all the circuits. In the fourth circuit it is Sect. 2.]

(*a*) The purpose of the rule is to enable the defendant in error or appellee to secure a dismissal when the writ of error or appeal is not being diligently prosecuted, or was not sued out in good faith. Sutherland v. Pearce, 186 Fed., 783. The defendant in error or appellee cannot docket the case and have it dismissed unless the plaintiff in error or appellant is in default. Hartshorn v. Day, 18 How., 28. And if the plaintiff in error dockets the case in time, the docketing stands notwithstanding the motion to dismiss. Davies v. Corbin, 113 U. S., 687.

(*b*) By Rule 19, Sect. 9, infra, notice of a motion to dismiss is required in all cases except where it is otherwise provided. The notice must be served long enough before the motion is heard to enable the opposite party to be present and contest it if he so desires. Davidson v. Lanier, 131 U. S., lxxii. It must also specify the time when the motion will be made. Glenny v. Langdon, 94 U. S., 604.

(*c*) It is ground for dismissal at the instance of the appellee, when the appellant has failed to enter the appeal and file a transcript, on or before the return of the citation, as provided in the first section of the rule. Wong Sang v. United States, 144 Fed., 968. But where the transcript was filed within the time specified in the citation, but after the return day of the writ of error, which was not made returnable, as it should have been, at the same time, and the case has not been carried over the term, it will not be dismissed. Town of Gilman v. Fernald, 141 Fed., 940.

(*d*) The plaintiff in error or appellant is not barred by a dismissal from taking a second appeal, provided it is taken within the period limited by law. Steamer Virginia v. West, 19 How., 182. United States v. De Pacheco, 20 How., 261.

3. Instead of having the case docketed for the purpose of having it dismissed under the provisions of the second section of this rule, the defendant in error or appellee, on payment of the usual fees, may file the record and cause the case to be docketed by the clerk, and if the record be filed and the case docketed, either by the plaintiff in error or appellant, within the time prescribed by the first section of this rule, or by the defendant in error or appellee under the provisions of this section, the case shall stand for argument.

[S. C. Rule 9, Sect. 2. C. C. A. Rule 16, Sect. 2 (Sect. 3 in fourth circuit), substantially the same in all the circuits.]

The clerk is not bound to docket a case until his fees are paid or secured, and where this is not done the case will be dismissed. Owings v. Tierman, 10 Pet., 24. Rensselaer v. Watts, 7 How., 784. Nor will it be reinstated upon a bond being subsequently filed. Selma & Meridian R. R. v. Louisiana National Bank, 94 U. S., 253. But the case will not be dismissed where the omission has been remedied before the motion to dismiss is made. Edwards v. United States, 102 U. S., 575. The present practice is to make a deposit of a certain sum with the clerk. Green v. Elbert, 137 U. S., 615, 622.

4. On the filing of the record the appearance of the counsel for the party docketing the case shall be entered, and

on or before the return day of the citation the counsel for the appellee or defendant in error shall also enter [an] appearance for the appellee or defendant in error.

[S. C. Rule 9, Sect. 3. C. C. A. Rule 16, Sect. 3 (Sect. 4 in fourth circuit), in force in substance in all the circuits.]

The purpose of the rule is to have some attorney of the court responsible for the prosecution of the case. Hurley v. Jones, 97 U. S., 318.

RULE 18. DOCKET AND ARGUMENT LISTS.

1. Upon the filing of the record in any case by the plaintiff in error or appellant and the payment by him of a deposit fee of twenty-five dollars, the clerk shall enter the case, the record of which is so filed, upon the docket of this court; such docket shall have all its cases arranged in their proper chronological order.

2. The clerk shall prepare and cause to be printed, previous to the opening of each term of this court, an Argument List of all cases the records of which shall have been filed with him not less than fifteen days before the opening of the term, which cases shall be put on the Argument List in the chronological order of docketing the same, subject, however, to the following system of grouping: The first group shall be composed of the cases in which all the circuit judges shall be competent to sit; the second, of the cases in which all the circuit judges except the youngest in commission shall be competent to sit; the third, of the cases in which all the circuit judges except the next to the youngest in commission shall be competent to sit; and the fourth, of the cases in which all the circuit judges except the oldest judge in commission shall be competent to sit.

[C. C. A. Rule 17. The rules in the different circuits differ with regard to the making up and the call of the argument list or calendar. They will be found in 150 Fed., xli, et seq., for all the circuits except the fourth and the eighth; and in 193 Fed., xi, for the fourth; and in 188 Fed., xx for the eighth circuit; and must be there consulted, if there is occasion to know the exact terms in each instance.]

RULE 19. ARGUMENTS, CONTINUANCES AND DISMISSALS.

1. The cases in the Argument List shall be called for argument at each term, or adjourned term, and cases shall be argued on call unless the court shall for good cause otherwise order.

2. If the defendant in error or appellee fails to appear when his case is called for argument (*a*), the court may proceed to hear the argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case (*b*).

[S. C. Rule 17. The second section of this rule appears as one or other section of C. C. A. Rule 22, in force under that number in all the circuits.]

(*a*) This means the time when called for actual argument, and not merely the time of going over the docket to see what cases are ready. Lem Hing Dun v. United States, 49 Fed., 145.

(*b*) The judgment is as conclusive as if there was an actual appearance and argument. United States v. Yates, 6 How., 605, 608.

3. For good cause shown the court may order the continuance of any case for the term.

4. When a case is reached in the regular call, and there is no appearance for either party, it may be dismissed at the cost of the plaintiff in error or appellant.

[S. C. Rule 18. C. C. A. Rule 22, in force in all the circuits under different numbered sections.]

5. Where no counsel appears for the plaintiff in error or appellant, and no brief has been filed for him, the defendant in error or appellee may have the writ of error or appeal dismissed at the cost of the defaulting party.

[S. C. Rule 16. It also appears as one or other section of C. C. A. Rule 22, in force in all the circuits. See also Rule 24, Sect. 4, infra.]

It was early held that where there was no appearance for the plaintiff in error, the defendant in error might have the plaintiff called and dismiss the writ of error; or he might have the record opened and pray for an affirmance. Montalet v. Murray, 3 Cranch, 249. And to the same effect are Portland Co. v. United States, 15 Wall., 1, Ryan v. Koch, 17 Wall., 19, and Fitch v. Richardson, 147 Fed., 196. Where an appearance which has been entered is withdrawn, the writ may be dismissed or the judgment affirmed under this rule. McGuire v. Commonwealth, 3 Wall., 382, 387.

The Court may dismiss for failure to file a brief, even where the delay was due to a stipulation between the parties. Missouri K. & T.

Co. v. Kidd, 146 Fed., 499. A motion to open the case and permit a brief to be filed comes too late after an affirmance for want of an appearance and brief, and an adjournment of the session. Watterson v. Payne, 154 U. S., 534.

6. If a case is called for argument at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant unless a sufficient cause is shown for further postponement.

[S. C. Rule 19. It also appears as Rule 22, Sect. 6, in the first circuit, and as Rule 17, Sect. 3 in the fourth; and as the last half of Rule 17 in the others, except the seventh and ninth, where it is not found in any form.]

7. Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

[S. C. Rule 28. C. C. A. Rule 20, in force in all the circuits.]

8. Cases may also be dismissed in accordance with the second section of Rule 17 (*a*), the first section of Rule 23 (*b*), and the fourth section of Rule 24 (*c*) of this court.

(*a*) That is to say by docketing and having the case dismissed where the plaintiff in error or appellant has failed to file the record on or before the return day; (*b*) for failure of plaintiff in error or appellant to pay the clerk upon ten days' notice of the estimated cost of printing the record; (*c*) or where the plaintiff in error or appellant is in default in filing his brief.

The court may dismiss for failure to file a brief even where the delay was due to a stipulation between the parties. Missouri K. & T. Co. v. Kidd, 146 Fed., 499; nor will additional time to print the record or to file and serve briefs, as required by the rules, be granted where nothing will be gained therefrom but delay. Matsumura v. Higgins, 187 Fed., 601.

9. Except as in the preceding sections of this rule it is otherwise provided, no motion to dismiss a writ of error or an appeal will be heard unless previous notice of the motion has been given to the plaintiff in error or appellant or his counsel.

[S. C. Rule 6, Sect. 3. C. C. A. Rule 21, Sect. 3, in all the circuits except the first, where it is Sect. 4.]

Reasonable notice must be given, that is to say, a long enough time before the motion is heard to enable the opposite party to contest it, if he so desires. Davidson v. Lanier, 131 U. S., lxxii. The notice must specify the time when the motion will be made. Glenny v. Langdon, 94 U. S., 604.

RULE 20. CERTIORARI.

1. No certiorari for diminution of the record (*a*) will be awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay (*b*).

[S. C. Rule 14. C. C. A. Rule 18, in force by that number in all the circuits.]

(*a*) A certiorari is the proper remedy where there are alleged deficiencies in the record. Hudgins v. Kemp, 18 How., 530, 534. The Rio Grande, 19 Wall., 178, 188. United States v. Davenport, 142 U. S., 704. The American Construction Co. v. Jacksonville Railway, 148 U. S., 372, 380. Flickinger v. Bank, 145 Fed., 162. Where the defect is apparent the appellate court may award the writ of its own motion. Morgan v. Curtenius, 19 How., 8. Sweeney v. Lomme, 22 Wall., 208. But it cannot be used to correct errors which exist in the record as it stands in the Court below. Hoskin v. Fisher, 125 U. S., 217, 224. Goodenough Mfg. Co. v. Rhode Island Mfg. Co., 154 U. S., 635; nor to introduce additional facts not shown in the findings. United States v. Adams, 9 Wall., 661; nor is it the proper remedy where the clerk has failed to sufficiently athenticate the record. Hodges v. Vaughan, 19 Wall., 12. Neither will it be granted to supply an omission in a bill of exceptions due to the party's own laches. New York & New England R. R. v. Hyde, 56 Fed., 188. Hume v. Bowie, 148 U. S., 245, 253. Kerrch v. United States, 171 Fed., 365.

Defects in the transcript cannot be supplied by reference to the record on appeal in another court. South Carolina v. Wesley, 155 U. S., 542. Nor can the transcript in a former appeal in the same case be taken without a further certificate. Merriman v. Chicago &c. R. R., 120 Fed., 240.

A return to the certiorari may be made by the clerk of the lower court instead of the judge. Stewart v. Ingle, 9 Wheat., 526.

(*b*) A certiorari on suggestion of a diminution of the record will be awarded even after the term where the delay is satisfactorily accounted for. Clark v. Hackett, 1 Black., 77. Stearns v. United States, 4 Wall., 1.

RULE 21. DEATH OF A PARTY (*a*)

1. Whenever, pending a writ of error or appeal in this court, either party shall die (*b*), the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous; provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

[S. C. Rule 15, Sect. 1. C. C. A. Rule 19, Sect. 1, in force in all the circuits.]

(*a*) This rule is based on Act March 3, 1875, Sect. 9. 18 Stat., 473. Prior to this enactment the practice was to apply to the court below to revive the suit in the name of the representatives of the deceased party. McClane v. Boon, 6 Wall., 244.

(*b*) If one of several plaintiffs or defendants dies before or after an appeal is taken and the cause of action is one that survives as to the rest, the survivors may prosecute the appeal alone, unless upon notice the representatives of the deceased party apply to join. Moses v. Wooster, 115 U. S., 285. McKinney v. Carroll, 12 Pet., 66, 71. But this cannot be done where the cause does not survive. Dolan v. Jennings, 139 U. S., 385. Whether a suit survives depends on the nature of the action. Schreiber v. Sharpless, 110 U. S., 76. And where the cause of action does not arise under a law of the United States it is governed by that of the State. Martin v. Baltimore & Ohio R. R., 151 U. S., 673. Hence a writ of error in an action, the cause of which does not survive either to heirs or personal representatives by the law under which it is brought, abates by the death of the person who alone was entitled to maintain the action. Ibid. Where the plaintiff below was merely a nominal party, and the record shows that the writ of error is prosecuted by the real party in interest, it will be allowed to stand, without the representatives of the deceased party having been brought in. Amadeo v. Northern Assur. Co., 201 U. S., 194. The administrator of the domicile of the deceased party may be substituted, although appointed in a different state from that where suit is brought. Noonan v. Bradley, 12 Wall., 121.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after

the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

[S. C. Rule 15, Sect. 2. C. C. A. Rule 19, Sect. 2, in force in all the circuits.]

Where the representatives of the deceased party are given the opportunity, but fail to appear the writ of error will abate. Phillips v. Preston, 11 How., 294. Barribeau v. Brant, 17 How., 43, 46.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that the said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at

least thirty days before the expiration of such ninety days; provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

[S. C. Rule 15, Sect. 3. C. C. A. Rule 19, Sect. 3, in force in all the circuits.]

RULE 22. MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

[S. C. Rule 6, Sects. 1 and 2. C. C. A. Rule 21, Sects. 1 and 2, the same in all the circuits but the first, where the sections are 2 and 6.]

Reasonable notice must be given of a motion to dismiss. Rule 19, Sect. 9, supra. Davidson v. Lanier, 131 U. S., lxxii. Glenny v. Langdon, 94 U. S., 604.

RULE 23. PRINTING AND DISTRIBUTING RECORDS (*a*).

1. It shall be the duty of the clerk, immediately after the record of any case shall have been filed with him and docketed and the deposit fee of twenty-five dollars shall have been paid, to notify counsel for all parties that he will print only the parts of the record mentioned in the second section of this rule, specifying what those parts shall be (*b*), and to notify the counsel for plaintiff in error or appellant of his estimate of the cost of printing such parts of the record and of his fee for preparing the parts for the printer, indexing the same and supervising the printing thereof. He shall print no other parts of the record unless, within ten days after such notice, he receives from some one or more of the counsel a written

certificate that in his or their judgment other specified parts thereof should be printed in order to enable this court properly to decide the questions raised, in which event the parts so certified as necessary shall also be printed (*c*). The court may, in its discretion, direct the printing of other parts of the record and, in lieu of printing patents or other exhibits, separate printed copies thereof, not less than ten in number, may be filed with the clerk. If other parts of the record than those specified in his notice shall be required to be printed by any of the counsel, or by this court, the clerk shall immediately notify the counsel for the plaintiff in error or appellant of his estimate of the additional cost of preparing, printing and indexing such other parts. The plaintiff in error or appellant shall pay to the clerk within ten days after notice of any estimate, the amount thereof, in default of which the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

[S. C. Rules 8 and 10. C. C. A. Rule 23, in force under different sections in all the circuits.]

(*a*) The printing as well as the authentication of the record on appeal is now covered by the following Act of Congress, which must be regarded as modifying the present rule:

An Act to diminish the expense of proceedings on appeal and writ of error or of certiorari.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower Court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: *Provided,* That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required.

SEC. 2. That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ of error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said

Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk's fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required.

Approved, February 13, 1911. 36 Stat., 901.

(*b*) In case of doubt the attorney for the appellant may be called on by the clerk to indicate what should go into the record. Burnham v. Railway, 87 Fed., 168. Penn. Co. v. Railway, 55 Fed., 131.

(*c*) When requested to insert a matter by one party and to leave it out by the other, the court may be applied to for directions. Hoe v. Kahler, 27 Fed., 145.

2. Unless additional parts of the record shall be required to be printed under the provisions of the first section of this rule, the clerk shall print, for the use of the court, only the following parts thereof:

In writs of error—

(a) The docket entries.

(b) The pleadings upon which the case was tried.

(c) The bill of exceptions.

(d) The motion and reasons for judgment non obstante veredicto, if any.

(e) The opinion of the court below, if any.

(f) The charge to the jury, if any.

(g) The verdict of the jury, if any.

(h) The judgment entered.

(i) The assignments of error.

In appeals—

(a) The docket entries.

(b) The pleadings on which the case was heard and determined.

(c) The evidence, if any, on which it was heard and determined.

(d) The report of the examiner, master, auditor, referee or other officer who first decided the case, if any.

(e) The exceptions to that report, if any.

(f) The opinion of the court, if any.

(g) The judgment or decree entered.

(h) The assignments of error.

In bankruptcy and other cases not being strictly within either of the above classes, the printed record shall conform as nearly as may be practicable to the record in appeals.

3. The clerk shall cause twenty-five copies of the record to be printed, and three copies thereof to be furnished to the counsel of the plaintiff in error or appellant, and also three copies to each of the counsel who shall have entered appearance for any of the other parties, and the remaining copies to be filed in his office, all, if possible, within thirty days after the payment to him of the amount of his estimate made under the provisions of the first section of this rule.

See Rule 14, Sects. 2, 3, 4, 5, and 7, and notes, supra, as to what is to be included in the record as returned and certified.

4. The clerk shall supervise the printing of the record, have it properly indexed and distribute printed copies thereof to the judges of the court from time to time as required.

By section 8 of this rule, infra, where the record or any part thereof has been printed in the court below, it may be embodied in and used as the record in the Court of Appeals, provided it complies in other respects with the requirements. And where the record is so accepted and used, the cost of printing is taxable against the losing party. Jayne v. Loder, 153 Fed., 739. See also Act Feb. 13, 1911, Sect. 1, 36 Stat., 901, quoted above under the first section of this rule.

5. If the actual cost of printing the record and the clerk's fee of twenty-five cents per page (*a*) for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same, but if they shall exceed the clerk's estimate the amount of such excess shall be paid to the clerk before he shall file the printed copies of the record or deliver any of them to the parties.

(*a*) This is the fee fixed by Rule 29, Sect. 7, infra; and is held to be still collectible, notwithstanding the Act of Feb. 13, 1911, 36 Stat., 901, for the service of indexing. Colt's Mfg. Co. v. New York Goods Co., 186 Fed., 625.

6. In case of reversal, affirmance or dismissal, with costs (*a*), the actual cost paid for printing the record (*b*) by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party in whose favor costs are awarded, shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

[S. C. Rule 10, Sect. 7. C. C. A. Rule 23, in force in varying form and different numbered sections in all the circuits.]

(*a*) See Rule 29, Sects. 1, 2 and 3, and notes, infra.

(*b*) An established practice of printing the record and taxing the expense as part of the costs has all the force of a rule of court. Detroit Heating Co. v. Kemp, 182 Fed., 847. The cost of printing is taxable against the losing party, although the printing was done at the instance of the plaintiff in error and not the clerk, where the record as so printed was accepted by the clerk and no timely objection made. Jayne v. Loder, 153 Fed., 739. The printing of unnecessary parts of the record, however, will be charged against the party who is responsible for it, whether successful or not. De Groot v. United States, 5 Wall., 419, 427. Ball & Socket Fastener Co. v. Kraetzer, 150 U. S., 111, 118. Railway v. Stewart, 95 U. S., 279, 284. United States Sugar Refinery v. Providence &c. Co., 62 Fed., 375. Eastman Co. v. Getz, 84 Fed., 458. Nederland Life Ins. Co. v. Hall, 86 Fed., 741. Ecaubert v. Appleton, 67 Fed., 917. And the court will take proof when necessary to fix the responsibility. United States Sugar Refinery v. Providence &c. Co., 62 Fed., 375. But the cost of printing briefs is not included. Ex parte Hughes, 114 U. S., 548. Kursheedt Mfg. Co. v. Naday, 108 Fed., 918. Lee Injector Co. v. Penberthy Injector Co., 109 Fed., 964.

7. Each printed record shall show, by a note or memorandum, the time when each pleading or document was filed, and shall contain at the tops of its pages running titles of its contents.

8. In any case where the record, or any part thereof, has been printed in the court below, the same may be embodied in and used as the printed record of this court (*a*); provided, the manner and style of the printing shall correspond with the requirements of the several sections of this rule for printing done under the supervision of the clerk of this court; but the plaintiff in error or appellant shall pay to the clerk of this court, not only the deposit fee of twenty-five dollars upon filing the record and having it docketed, but also the fee prescribed by Rule 29 [Sect. 7], for preparing the record for the printer, indexing (*b*) the same, supervising the printing, and distributing the copies thereof.

(*a*) See Act. Feb. 13, 1911, 36 Stat., 901, quoted above in note (*a*) to section 1 of this rule. Where an appeal has been taken by the defendant the plaintiff is entitled to demand payment of the cost of printing the record, used at the hearing, which has been taxed as part of the costs against the defendants, before furnishing the latter with copies for use in making up the record for appeal. Parsons Non-skid Co. v. Willis Co., 192 Fed., 47.

(*b*) A fee of 25 cents per page for indexing may still be charged, notwithstanding the Act of Feb. 13, 1911, 36 Stat., 901. Colt's Mfg. Co. v. New York Goods Co., 186 Fed., 625.

9. The clerk shall, on or before the conclusion of each case, collect and file for preservation in this court three copies of the printed record and of each brief, printed motion and argument submitted in such case, and shall, immediately after the mandate in any case shall have been sent down to the lower court, notify the defeated party in this court that unless he removes the remaining copies of the record and briefs within ten days after notice so to do, the same will be destroyed.

RULE 24. BRIEFS (*a*).

1. In each case in which the printed record has been delivered by the clerk to the counsel for the plaintiff in error or appellant sixty or more days before the first day of the term, such counsel shall file twenty copies of his brief with the clerk not less than thirty days before the first day of such term; in each case in which the printed record has been delivered by the clerk to such counsel between thirty days and sixty days before the first day of such term, twenty copies of such brief shall be filed with the clerk not less than twenty days before the first day of such term; and in all other cases twenty copies of such brief shall be filed with the clerk not less than fifteen days after the receipt of such printed record. Within the same time such counsel shall give to counsel for the defendant in error or appellee not less than five copies of such brief.

2. This brief shall contain (*b*), in the order here stated:

(a) The names of the parties and the nature of the proceedings.

(b) A short abstract of the bill or declaration or petition, and of the plea or answer.

(c) A statement of the question or questions involved, which shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatever.

(d) A concise abstract or statement of the case.

(e) The assignments of error relied on (*c*), and, where any assignment of error is based on any bill of exceptions or any part of a bill of exceptions, a reference to the particular page of the record where the exception may be found. (*d*).

(f) Argument on the part of the plaintiff in error or appellant, which shall exhibit a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length (*e*).

3. At least five days before the case is called for argument, the counsel for the defendant in error or appellee shall file with the clerk twenty printed copies of his brief, and give not less than five copies thereof to the counsel for the plaintiff in error or appellee (*f*). His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case unless that presented by the plaintiff in error or appellant is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by special leave of the court (*g*).

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

[S. C. Rule 21. C. C. A. Rule 24, substantially the same in all the circuits.]

(*a*) On the general subject of briefs, see 2 Cyc., 1013-1025. Printed briefs are evidently contemplated, although the cost of printing them cannot be taxed as costs. Ex parte Hughes, 114 U. S., 548. Kursheedt Mfg. Co. v. Naday, 108 Fed., 918. Lee Injector Co. v. Penberthy Injector Co., 109 Fed., 964. Unglazed paper is required in the Supreme Court, and the quotations must be printed in type easily read. Wisconsin &c. R. R. v. Jacobson, 179 U. S., 287.

(*b*) Conformity with the rules with regard to briefs will be strictly enforced. Lincoln v. Sun Vapor Street Light Co., 59 Fed., 756. An

impertinent or scandalous brief will be stricken from the files. Green v. Elbert, 137 U. S., 615, 624. Smith v. Simpson, 140 Fed., 712.

(*c*) The court will not consider assignments not specified or discussed in the briefs. Western Union Tel. Co. v. Winland, 182 Fed., 493. Nor will an objection be considered in the brief where there is no corresponding error assigned. Lincoln v. Sun Vapor Street Light Co., 59 Fed., 756, 758. Aetna Indemnity Co. v. Crowe Coal Co., 154 Fed., 545.

(*d*) Davidson S. S. Co. v. United States, 142 Fed., 315.

(*e*) A submission will be set aside where this is not observed. School Dist. v. Insurance Co., 101 U. S., 472.

(*f*) Mailing of briefs to opposing counsel the prescribed time before the argument is a sufficient compliance with the rule. Russo-Chinese Bank v. National Bank of Commerce, 187 Fed., 80.

(*g*) See also Rule 19, Sect. 5, supra. Where no brief is filed by counsel for the plaintiff in error or appellant, the appeal may be dismissed. Portland Co. v. United States, 15 Wall., 1; or the record may be opened and the judgment affirmed. Ryan v. Koch, 17 Wall., 19. Fitch v. Richardson, 147 Fed., 196. Moline Trust Co. & Savings Bank v. Wylie, 149 Fed., 734. The court may dismiss for failure to file a brief, even where the delay was authorized by a stipulation between the parties. Missouri K. & T. Co. v. Kidd, 146 Fed., 499. A motion to open the case and permit the filing of a brief comes too late after the judgment has been affirmed for want of an appearance and brief, and the session has been adjourned. Waterson v. Payne, 154 U. S., 534.

RULE 25. ORAL ARGUMENTS (*a*).

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument (*b*).

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours (*c*) on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

[S. C. Rule 22. C. C. A. Rule 25, substantially the same, except in the matter of time, in all the circuits. Reading at length from briefs or reported cases is prohibited in the seventh circuit, 150 Fed., cvi.]

(*a*) The Supreme Court Rules provide that cases may be submitted on printed briefs without oral argument. Rule 20, Sect. 1. And stipu-

lations for submitting cases cannot be withdrawn except by consent or leave of court for cause shown. Muller v. Dows, 94 U. S., 277. Aurrecoechea v. Bangs, 110 U. S., 217. But such a stipulation will not be enforced against the protest of one of the parties in advance of the case being reached in its order. Glen v. Fant, 124 U. S., 123.

(*b*) Unless there is a cross appeal, appellees cannot be heard except in support of the decree below. Chittenden v. Brewster, 2 Wall., 191. The Stephen Morgan, 94 U. S., 599. Loudon v. Taxing District, 104 U. S., 771.

(*c*) Two hours on a side is the rule in all the circuits but the second, fifth and ninth. In the second circuit, on writs of error, admiralty appeals, appeals from the granting of preliminary injunctions, and customs appeals, the time given is an hour on a side; and in other cases an hour and a half. But where there are no difficult questions of law, and the amount involved does not exceed five hundred dollars, and in appeals and petitions for review in bankruptcy the time is half an hour. In the fifth circuit the time is an hour on a side with thirty minutes to plaintiff to reply. And in the ninth the time given is an hour on each side.

RULE 26. OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be filed by the clerk.

[S. C. Rule 25, Sect. 2. C. C. A. Rule 28 (Rule 26 in seventh circuit), in force in all the circuits, with variations as to printing and recording.]

RULE 27. REHEARING (*a*).

1. A petition for rehearing (*b*) a cause may be filed with the clerk at any time within thirty days (*c*) after the entry therein of the final judgment or final decree of this court, and, if the term within which such judgment or decree shall have been entered shall expire during said period of thirty days, the judgment or decree, and the record on which the same shall have been entered, shall nevertheless remain subject to the control of this court until the full expiration of the time herein allowed for the filing of the petition (*d*); provided, however, that no such petition shall be filed after this court, by any order made within said period of thirty days, shall have directed the immediate issue of a mandate or other process in the nature of a procedendo (*dd*). The petition shall be printed, shall briefly and distinctly state the reasons for a rehearing (*e*), and shall be supported by the certificate of counsel (*f*).

[S. C. Rule 30. C. C. A. Rule 29 (Rule 27 in seventh circuit), in force in all the circuits.]

(*a*) On the general subject of a rehearing, see 3 Cyc., 212-219. The pendency of a petition for a rehearing operates to prevent the judgment or decree from becoming final, for the purpose of a writ of error or appeal, until it is disposed of. Title Guaranty Co. v. General Electric Co., 222 U. S., 401. And the granting of a rehearing without restriction operates to vacate the judgment of the appellate court so that the case stands as if no judgment had been entered. Hook v. Mercantile Trust Co., 95 Fed., 41. Where a motion for a rehearing is entertained and permitted to be argued, but not actually granted, and the judges who hear the motion are equally divided, the previous decision, even if a reversal, stands. Carmichael v. Eberle, 177 U. S., 63.

(*b*) A form of petition will be found in New Orleans v. Warner, 176 U. S., 92, and in People v. Pearson, 3 Ill. (Scamm), 406.

(*c*) The thirty day limitation is one of convenience only, and should not be enforced where the ground on which a rehearing is asked is that the authority on which the decision of the court was predicated has been reversed. Unitype Co. v. Long, 149 Fed., 196. Ordinarily, however, where the time allowed by the rule for an application for a rehearing has expired, an application will not be entertained unless counsel were not advised of the decision, or the ground of the application could not have been ascertained within the time. Crabtree v. McCurtain, 66 Fed., 1.

(*d*) Except for the extension granted by the rule, application would have to be made during the term. Bushnell v. Crooke Mining Co., 150 U. S., 82. Kirchberger v. American Acetylene Co., 142 Fed., 169. It must always be made before the case has been remitted to the court below. Browder v. McArthur, 7 Wheat., 58. Sibbald v. United States, 12 Pet., 488. Washington Bridge Co. v. Stewart, 3 How., 413. Peck v. Sanderson, 18 How., 42. But this may be remedied by recalling the mandate. American Caramel Co. v. Mills, 162 Fed., 147. Cf. Ex parte Crenshaw, 15 Pet., 119.

(*dd*) See Rule 30, infra.

(*e*) A petition for a rehearing should not consist of an argument, only applicable in case a rehearing is granted. The Dago, 63 Fed., 182. It is too late to raise a question for the first time on a petition for a rehearing, or to present a theory in conflict with the original argument. Merriman v. Chicago & East. Ill. R. R., 66 Fed., 663. It is not enough that the case is one of great importance, where there is no suggestion that any consideration or authority entitled to weight has been overlooked. Camfield v. United States, 67 Fed., 17. Nor will a rehearing be granted on the ground that the record was imperfect when it appears on examination that the matters left out presented nothing affecting the result. Ambler v. Whipple, 23 Wall., 278. The existence of new and material evidence will not be ground for a rehearing, which must be had, if at all, on the record as it was made in the court below. Maxwell Land-Grant case, 122 U. S., 365. Gregory v. Pike, 67 Fed., 837, 852. Randolph v. Allen, 73 Fed., 23, 32. Where after discovered evidence is urged as a ground for rehearing in admiralty (as it may be, the case being de novo), it must be shown why it was not previously ascertained. The Iron Chief, 63 Fed., 289. That the court misquoted the evidence is not sufficient where this did not affect the result. Torrent v. Duluth Lumber Co., 32 Fed., 229. A second application for a rehearing on the same point on which a former application was refused will not be entertained. Williams v. Conger, 131 U. S., 390. A request for the findings required in a bankruptcy case on appeal to the Supreme Court should be made prior to a decision by the Court

of Appeals, in anticipation that it may be adverse. Knapp v. Milwaukee Trust Co., 162 Fed., 675. Crucible Steel Co. v. Holt, 174 Fed., 127. So a request to certify questions to the Supreme Court is too late after a decision has been made. Wall v. Cox, 181 U. S., 244.

But the reversal of an authority on which the decision of the court was predicated is a good ground for a rehearing. Unitype Co. v. Long, 149 Fed., 196. And so is the omission from the transcript of that which was material to the decision. Ambler v. Whipple, 23 Wall., 278, 282; or where by reason of the failure to issue and serve a citation, the case was not properly before the court. Ex parte Crenshaw, 15 Pet., 119, 123; or where there is ground to modify the mandate, as alleged. American Caramel Co. v. Mills, 162 Fed., 147. Novelty Glass Mfg. Co. v. Brookfield, 172 Fed., 221. Exchange Mutual Ins. Co. v. Warsaw-Wilkinson Co., 185 Fed., 487.

(*f*) The certificate of counsel required is that the petition for a rehearing in their judgment is well founded. See New Orleans v. Warner, 176 U. S., 92. Where there is no certificate the petition will be denied. Hinds v. Keith, 57 Fed., 10. No reply by the opposite party is allowed to the petition. Ambler v. Whipple, 23 Wall., 278, 282.

RULE 28. INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered (*a*).

[S. C. Rule 23, Sect. 1. C. C. A. Rule 30, Sect. 1, (Rule 28 in seventh circuit), in force in all the circuits.]

(*a*) Before this rule, interest was allowed on judgments at the rate of six per cent. Perkins v. Fourniquet, 14 How., 328. The object of the change was to put suitors in the Federal and State Courts on the same footing in this respect. Hammenway v. Fisher, 20 How., 255, 25. Interest may be allowed against a foreign state, when a litigant, the same as in other cases. Ex parte Colombia, 195 U. S., 604. It is also to be allowed where judgment against a collector of customs for moneys wrongly demanded on entries is affirmed. Schell v. Cochran, 107 U. S., 625.

Where there has been no allowance of interest by the appellate court, none can be allowed in the court below, upon the case being sent down. Himely v. Rose, 5 Cranch, 313, 317. The Santa Maria, 10 Wheat., 431, 442. Boyce v. Grundy, 9 Pet., 275, 290. In re Washington & Georgetown R. R., 140 U. S., 91. Green v. Chicago S. & C. R. R., 49 Fed., 907. People's Bank v. Aetna Insurance Co., 76 Fed., 548, 550. The Glenochil, 128 Fed., 963. Where there has been no allowance of interest or damages it is the equivalent of a denial of both. Boyce v. Grundy, 9 Pet., 275, 290.

Interest is confined to the debt, and does not extend to the damages awarded for delay. The Perseverance, 3 Dall., 336. Neither is it to be added to a judgment for costs. People's Bank v. Aetna Ins. Co., 76 Fed., 548.

2. In all cases where a writ of error (*a*) shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay (*b*), damages at a rate not exceeding ten per cent. (*c*), in addition to interest, shall be awarded upon the amount of the judgment.

[S. C. Rule 23, Sect. 2. C. C. A. Rule 30, Sect. 2 (Rule 28, in seventh circuit), in force in all the circuits.]

(*a*) The court has power to award damages for delay in the case of an appeal, the same as a writ of error. Gibbs v. Diekma, 131 U. S., clxxxvi.

(*b*) No damages can be awarded except for delay. Cotton v. Wallace, 3 Dall., 302, 304. The remedy for delay is an award of damages under the rule. The case cannot be dismissed upon that ground. Amory v. Amory, 91 U. S., 356. Damages will be imposed under the rule where there appears to be no plausible ground for the appeal. Texas & Pacific R. R. v. Volk, 151 U. S., 73. They will be awarded where a case is carried up in disregard of the settled precedents of the court. Pennywit v. Eaton, 15 Wall., 382. But not where the law was not settled at the time the writ of error was prosecuted, although it may have become so since. McKee v. Rains, 10 Wall., 22. The case will not be regarded as one which has been sued out for delay, where the question involved is the construction of a state statute, which has not been passed upon by the state courts and is fairly in doubt. Times Dem. Pub. Co. v. Mozee, 136 Fed., 761. The court must be convinced that the purpose of the writ of error or appeal was delay. McNeil v. Holbrook, 12 Pet., 84.

In the following cases the penalty was imposed under various circumstances. Barrow v. Hill, 13 How., 54. Kilbourne v. State Sav. Inst., 22 How., 503. Sutton v. Bancroft, 23 How., 320. Jenkins v. Banning. Ibid, 455. Prentice v. Pickersgill, 6 Wall., 511. Campbell v. Wilcox, 10 Wall., 421. Insurance Co. v. Huchbergers, 12 Wall., 164. Hennessy v. Sheldon. Ibid, 440. Hall v. Jordan, 19 Wall., 271. Peyton v. Heinekin, 131 U. S., ci. Gibbs v. Diekma, Ibid, clxxxvi. Whitney v. Cook, Ibid cxcvii. Sire v. Ellithorpe Air Brake Co., 137 U. S., 579. Gregory Consolidated Mining Co. v. Starr, 141 U. S., 222. Watterson v. Payne, 154 U. S., 534.

(*c*) The court cannot award more than ten per cent. damages, but it can award less. West Wisconsin Railway v. Foley, 94 U. S., 100.

3. The same rule shall be applied to decrees for the payment of money in cases in equity (*a*), unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed, if specially directed by the court (*b*).

[S. C. Rule 23, Sects. 3 and 4. C. C. A. Rule 30, Sects. 3 and 4 (Rule 28, in the seventh circuit), in force in all the circuits.]

(*a*) The court may award damages for delay in the case of appeals the same as writs of error, although the statute (Rev. Stat., Sect. 1010)

only speaks of the one, both being made subject by law to the same rules. Rev. Stat., Sects. 10 and 12. Gibbs v. Diekma, 131 U. S., clxxxvi.

(*b*) Where there is no allowance of interest on affirmance, none can be given by the lower court after the case is sent down. The Glenochil, 128 Fed., 963.

RULE 29. COSTS (*a*).

1. In all cases where any suit shall be dismissed (*b*) in this court, except where the dismissal shall be for want of jurisdiction (*c*), costs (*d*) shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

[S. C. Rule 24, Sect. 1. C. C. A. Rule 31, Sect. 1 (Rule 29, in seventh circuit), in force in all the circuits.]

(*a*) The state law may be followed with regard to costs, where there is no Act of Congress which governs the case. Michigan Aluminium Foundry Co. v. Aluminium Co., 190 Fed., 903. On petition for a mandamus where there is simply a rule to show cause, costs will not be allowed. In re Haight & Freese, 164 Fed., 688.

(*b*) For the various grounds on which a case may be dismissed, see Rule 17, Sect. 2; Rule 19, Sects. 5, 6, 7, and 9; Rule 23, Sect. 1; and Rule 24, Sect. 4; and notes.

(*c*) Where the case is dismissed for want of jurisdiction, the court ordinarily can give no costs. Burnham v. Rangeley, 2 Wood. & Minot, 417. Montalet v. Murray, 4 Cranch, 46. McIver v. Wattles, 9 Wheat., 650. Strader v. Graham, 18 How., 602. Hornthall v. Collector, 9 Wall., 560. M. C. & L. M. Railway v. Swan, 111 U. S., 379. Citizens' Bank v. Cannon, 164 U. S., 319, 324. If there is no jurisdiction there is no power to do anything but to strike the case from the docket. Mayor v. Cooper, 6 Wall., 247, 250. M. C. & L. M. Railway v. Swan, 111 U. S., 379. No change in this respect has been made by Rev. Stat., Sects. 823 and 983. Pentlarge v. Kirby, 20 Fed., 898. But see United States v. Treadwell, 15 Fed., 532. Cooper v. New Haven Steamboat Co., 18 Fed., 588. Costs on appeal, however, even on dismissal for want of jurisdiction, will be given against the party who wrongly invoked the jurisdiction of the court below. Winchester v. Jackson, 3 Cranch, 514. Montalet v. Murray, 4 Cranch 46. Hornthall v. Collector, 9 Wall., 560. M. C. & L. M. Railway v. Swan, 111 U. S., 379. And this is true even where the party is successful in the appellate court, the reversal being due to the fault of such party in wrongfully invoking that jurisdiction. Blacklock v. Small, 127 U. S., 96. Torrence v. Shedd, 144 U. S., 527. Cates v. Allen, 149 U. S., 451. Tennessee v. Union Planters' Bank, 152 U. S., 454. Hanrick v. Hanrick, 153 U. S., 192, 198. Southwestern Tel. & Telp. Co. v. Robinson, 48 Fed., 769. Craswell v. Belanger, 56 Fed., 529. And where a necessary party defendant has been omitted, the other defendant is entitled to his costs on appeal. Gaylords v. Kelshaw, 1 Wall., 81. On motion to dismiss for want of jurisdiction the defendant in error is also entitled to the costs incident to the motion. Bradstreet v. Higgins, 114 U. S., 262; and an attorney fee, such as is ordinarily allowed on the final disposition of a case, will be given. Josslyn v. Phillips, 27 Fed., 481. Where the appellate court has jurisdiction of the order appealed from, the appellant is entitled to costs on appeal if successful, even though the lower court is directed to dismiss the bill for want of jurisdiction. Industrial & Mining Guaranty Co. v. Electrical Supply Co., 58 Fed., 732.

(*d*) Where costs are awarded on a dismissal it includes the actual costs paid for printing the record by the party in whose favor costs are awarded together with the clerk's fee for supervising the printing when paid by such party. Rule 23, Sect. 6, supra. Nichols, Shepard & Co. v. Marsh, 131 U. S., 401. Ferguson v. Dent, 46 Fed., 88. If the printed record is unnecessarily prolix, the cost of the excess may be taxed against the party responsible for it. United States Sugar Refinery v. Providence Steam & Gas Pipe Co., 62 Fed., 375. No costs can be allowed however, for the printing of briefs. Ex parte Hughes, 114 U. S., 548. Kursheedt Mfg. Co. v. Naday, 108 Fed., 918. Lee Injector Co. v. Penberthy Injector Co., 109 Fed., 964.

2. In all cases of affirmance (*a*) of any judgment or decree in this court, costs (*b*) shall be allowed to the defendant in error or appellee (*c*), unless otherwise ordered by the court (*d*).

[S. C. Rule 24, Sect. 2. C. C. A. Rule 31, Sect. 2 (Rule 29, in seventh circuit), in force in all the circuits.]

(*a*) Costs will be given on affirmance, even though the decree is sustained on other grounds than those assigned in the court below. Post v. Vacuum Pump Co., 89 Fed., 1. This is true of an affirmance by a divided court, which although otherwise ineffective settles the rights of the parties thereto. Westhus v. Union Trust Co., 168 Fed., 617. On an affirmance, an attorney fee of twenty dollars will be taxed. Kansas City R. R. v. McDonald, 60 Fed., 522. Shillito Co. v. McClung, 66 Fed., 22.

(*b*) As to including the cost of printing, see Rule 23, Sect. 6, and notes. And also notes under Sect. 1, note (*d*) of the present rule, supra.

(*c*) Where there are several appellees who appear separately and file separate briefs, separate costs should be taxed. Augusta Trust Co. v. Federal Trust Co., 153 Fed., 157.

(*d*) Where both parties appeal and the decree is not disturbed, neither party recovers costs. The Parkersburgh, 5 Blatchford, 247. The Atlas, 10 Blatchford, 459. The William Cox, 9 Fed., 672. Where costs are divided by the appellate court, only the ordinary taxable costs incident to the litigation are meant. Kell v. Trenchard, 146 Fed., 245.

3. In cases of reversal (*a*) of any judgment or decree in this court costs (*b*) shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court (*c*). The cost of the transcript of the record (*d*) from the court below shall be taxable in that court (*e*) as costs in the case.

[S. C. Rule 24, Sect. 3. C. C. A. Rule 31, Sect. 3, in all the circuits except the first, where it is Rule 31, Sects. 3 and 4, and the seventh, where it is Rule 29, Sect. 3. In the eighth circuit the section is considerably amplified.]

(*a*) The rule in some jurisdictions, that the costs on a reversal are to abide the event of the suit (Wright v. Small, 5 Binny, 204. Hamilton v. Aslin, 3 Watts., 222. Smith v. Sharp, 5 Watts., 292. Lehigh Valley R. R. v. McFarland, 44 N. J. Law, 674), does not obtain in the Federal Courts. Berthold v. Burton, 169 Fed., 495. Jennings v. Burton, 177 Fed., 603.

(*b*) When judgment is reversed with costs it includes all the costs of the appeal no matter how or when taxable. Berthold v. Burton, 169 Fed., 495. But only the ordinary taxable costs incident to the litigation and not necessarily the expenses of a receivership. Kell v. Trenchard, 146 Fed., 245.

(*c*) Costs do not always follow in case of a reversal. Montalet v. Murray, 4 Cranch, 46. The court has a certain discretion under the rule. M. C. & L. M. Railway v. Swan, 111 U. S., 379. Kell v. Trenchard, 146 Fed., 245. Where the appellant only succeeds in having the decree modified in a minor particular neither party will be given costs. New England R. R. v. Carnegie Steel Co., 75 Fed., 54. Packard v. Lacing Stud Co., 70 Fed., 66. Northern Trust Co. v. Snyder, 77 Fed., 818. Mason v. Graham, 23 Wall., 261. Where also the decree in the lower court is broader than the findings, the appellate court in correcting the decree will allow no costs to either party. Shute v. Morley Sewing Machine Co., 64 Fed., 368. Blair Camera Co. v. Eastman Co., 64 Fed., 491. Where the appellant is in default for delays, even though successful, he will be given no costs. The Ethel, 66 Fed., 340. Nor should costs be allowed on a reversal in bankruptcy when the petition for review was delayed nearly six months, and the property has depreciated meantime. In re Endlar, 192 Fed., 762. Where a decree in admiralty is reversed on new evidence, not previously accessible, neither party being in fault, each party should pay his own costs on appeal. The Oxford, 66 Fed., 590. Where a party took no appeal he is not entitled to costs in the appellate court, whatever may be the case in the court below. Pollard v. Reardon, 65 Fed., 848. Only the costs of that party in whose favor the judgment is reversed are taxable. Sully v. American National Bank, 179 U. S., 68. Where the Supreme Court on error to a state court modifies, with costs to the defendant, certain judgments of the state court in favor of the plaintiff, the defendant, is entitled only to the costs in the Supreme Court, and the plaintiff is still entitled to the costs awarded him by the original judgment. Stevens v. Central National Bank, 168 N. Y., 560.

Upon a reversal for want of jurisdiction the court may make such order in respect to costs as right and justice may require. M. C. & L. M. Railway v. Swan, 111 U. S., 379, 388. Peper v. Fordyce, 119 U. S., 469. Where therefore on removal from a state court, the federal court wrongly took jurisdiction, costs will be awarded against the party by whom the jurisdiction was invoked. Cates v. Allen, 149 U. S., 451. Hanrick v. Hanrick, 153 U. S., 192, 198. Southwestern Tel. & Telp. Co. v. Robinson, 48 Fed., 769. Craswell v. Belanger, 56 Fed., 529. Sneed v. Sellers, 68 Fed., 729. Tug River Coal Co. v. Brigel, 67 Fed., 625, 630. Where both parties are responsible for it the costs will be divided. Peper v. Fordyce, 119 U. S., 469. And where the question of jurisdiction is raised in the appellate court for the first time, full costs will be given to the defendant in the lower court, but will be divided in the court above. Tug River Coal Co. v. Brigel, 67 Fed.. 625. Where the appellate court has jurisdiction over the order appealed from, the appellant is entitled to costs on the appeal, even though the lower court is directed to dismiss the case for want of jurisdiction. Industrial & Mining Guaranty Co. v. Electrical Supply Co., 58 Fed., 732. And where a necessary party defendant was omitted, the other defendant was held entitled to costs on appeal, even though the case was remanded with directions to dismiss the bill unless amended in a way which would give jurisdiction. Gaylords v. Kelshaw, 1 Wall., 81. But where the want of jurisdiction for failure of the record to show a diversity of

citizenship was raised for the first time on appeal, the reversal will be without costs. Newcomb v. Burbank, 181 Fed., 334.

(*d*) As to what the transcript should contain, see Rule 14, Sect. 2, and notes, supra; and as to the costs of printing, see Rule 23, Sect. 6 and notes, supra.

Where counsel stipulate as to what part of the record is to be included, it is the duty of the clerk to recognize it, and compensation will only be allowed for that which is embraced in the stipulation. Lamb Knit Goods Co. v. Lamb Glove & Mitten Co., 120 Fed., 267. Where requested to insert a matter by one party and to leave it out by another, the court below may be appealed to for directions. Hoe v. Kahler, 27 Fed., 145. The clerk may refuse to certify where there are palpable omissions. Nashua & Lowell R. R. v. Bost. & Lowell R. R., 61 Fed., 237, 243.

Exemplifications and copies of papers must have been actually used at the trial or at least have been obtained for that purpose, to make the costs of obtaining them taxable. Wooster v. Handy, 23 Fed., 49, 60. A copy of the stenographer's notes obtained by counsel for his own convenience cannot be included. The William Branfoot, 52 Fed., 390, 395. Gunther v. Liverpool, &c. Ins. Co., 10 Fed., 830. Kelly v. Springfield Railway, 83 Fed., 183. Monahan v. Godkin, 100 Fed., 196. Nor can the amount paid to the stenographer for a transcript, used by the plaintiff in preparing the bill of exceptions on a former appeal, be taxed. Pine River Logging Co. v. United States, 186 U. S., 279, 297.

(*e*) The cost of the transcript is to be taxed in the court below, and not in the appellate court. Lee Injector Co. v. Penberthy Injector Co., 109 Fed., 964.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for (*a*) or against (*b*) the United States.

[S. C. Rule 24, Sect. 4. C. C. A. Rule 31, Sect. 4, in all the circuits except the first, where it is Rule 31, Sect. 5, and the seventh, where it is Rule 29, Sect. 4.]

(*a*) The rule does not prohibit the allowance to the United States if successful of costs in the court below. United States v. Southern Pacific R. R., 56 Fed., 865. United States v. Sanborn, 135 U. S., 271.

(*b*) But there can be no judgment for costs under any circumstances against the United States. Stanley v. Schwalby, 162 U. S., 255, 272.

5. When costs are allowed in this court (*a*), it shall be the duty of the clerk to insert the amount thereof in the body of the mandate (*b*), or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail (*c*).

[S. C. Rule 24, Sect. 6. C. C. A. Rule 31, Sect. 5, in all the circuits except the first, where it is Sect. 6, and the seventh circuit, where it is Rule 29, Sect. 5.]

(*a*) See the preceding sections of this rule, and notes. Also, Rule 23, Sect. 6 and notes, supra.

(*b*) See Rule 30 and notes, infra. The court below is controlled by the mandate. The Glenochil, 128 Fed., 963. And where costs are awarded and judgment is rendered for them under the mandate, they are beyond the control of the lower court. Scatcherd v. Love, 166 Fed., 53. The costs taxed on appeal and inserted in the mandate are to be included in the decree of the court below, and an execution may issue therefor. Corn Products Co. v. Chicago Real Estate Co., 185 Fed., 63. It has been held, however, that to authorize an execution for costs awarded by the Court of Appeals the mandate should contain a special provision, directing execution to issue. American Trust & Savings Bank v. Ziegler Coal Co., 165 Fed., 512. But while the court below has no authority to modify the mandate, it has authority to construe it; and where the decree is affirmed "with costs of the action," all the costs of the litigation will be given up to and including the final decree, as well as any costs accruing afterwards. Persons v. Wirgman, 140 Fed., 207.

(*c*) Costs taxed in the court of appeals without objection cannot be objected to in the lower court after a remand. Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed., 568. But a mandate fixing the amount which the plaintiff is entitled to recover does not prevent the court below in its decree from including the costs of suit in that court. New Orleans v. Gaines, 138 U. S., 595.

6. In all cases certified to the Supreme Court (*a*) or removed thereto by certiorari (*b*) or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court (*c*).

[C. C. A. Rule 31, Sect. 6, in all the circuits except the first, where it is Sect. 7; and the seventh, where it is Rule 29, Sect. 6.]

(*a*) Where the question of jurisdiction is certified nothing else can be considered. Venner v. Great Northern Railway, 209 U. S., 24. A question cannot be certified by the Court of Appeals after it has actually been decided by that Court. Wall v. Cox, 181 U. S., 244.

(*b*) As to the fees of the clerk in any case removed to the Supreme Court by certiorari, the Act of February 13, 1911, Sect. 2, 36 Stat., 901, controls. For the provisions of that Act, see Rule 23, Sect. 1, note (*a*), supra.

(*c*) The clerk where entitled to fees must be paid in advance. Steever v. Rickman, 109 U. S., 74. Bean v. Patterson, 110 U. S., 401. Hoysradt v. D. L. & W. R. R., 182 Fed., 880. A writ of error or appeal cannot be prosecuted in forma pauperis, either to the Supreme Court or the Court of Appeals. Bradford v. Southern Railway, 195 U. S., 243. Taylor v. Adams Express Co., 164 Fed., 616.

7. In pursuance of the Act of Congress of February 19, 1897 (29 Stat. 536, c. 263), and of the order of the Supreme Court of January 10, 1898, as amended February 28, 1898 (90 Fed. Rep. clxxi), the following table of fees and costs is established for this court (*a*):

Docketing a case and filing the record	$5.00
Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	.25
Filing a motion, order, or other paper	.25
Entering any rule, or making or copying any record or other paper, for each one hundred words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept and paid	
Preparing the record for the printer, indexing the same (*b*), supervising the printing and distributing the copies, for each printed page of the record and index	.25 (*c*)
Making a manuscript copy of the record (*d*), when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	.20
Issuing a writ of error and accompanying papers, or a mandate or other process	5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal for each printed page (but not to exceed five dollars in the whole for any copy)	1.00
Attorney's docket fee	20.00 (*e*)

(*a*) The fees here are those established by the Supreme Court. 150 Fed., cxxxix.

(*b*) The indexing is indivisible, as a separate matter, from the supervising, printing and distributing, and no provision being made for it in the Act of February 13, 1911, 36 Stat., 901, and it being important to have comprehensive indices for all records, the clerk is entitled to twenty-five cents a page, in consequence, the same as previously. Colt's Mfg. Co. v. New York Goods Co., 186 Fed., 625.

(*c*) The clerk of the District Court can make no claim to this fee. If he prints the record he is confined to the actual cost. Thornton v. Insurance Co.'s., 125 Fed., 250. Doherty's Accounts, Bowler's Comp. Dec., 253.

And now by Act Feb. 13, 1911, Sect. 1, 36 Stat., 901, the appellant or plaintiff in error shall print, under such rules as the District Court shall prescribe, and shall file with the clerk of the Court of Appeals, at least twenty-five days before the case is called for argument, at least

twenty-five printed transcripts of the record, and of such part or abstract of the proofs as the rules of the Court of Appeals may require, and in such form as the Rules of the Supreme Court may prescribe, one of which printed transcripts shall be certified by the clerk of the lower court, under his hand and the seal of such court, and three copies of such printed transcript shall be furnished to the adverse party twenty days before the argument. And (Sect. 2), where a final judgment or decree is sought to be reviewed on appeal, to or by a writ of error or certiorari from the Supreme Court, and the record has been printed and used in the court below, and substantially conforms to the printed record in the Supreme Court, if twenty-five copies of the printed record in addition to those provided in the first section of the act have been lodged with the clerk below, at the time of filing the printed record, one copy thereof shall be used by the clerk of the court below in the preparation, and as a part of the transcript of the record; and no fees shall be allowed to the clerk of the court below in the preparation of the transcript for such part as is included in the printed record. It is further provided that the clerk's [of the Supreme Court] fee for preparing the record for the printer, indexing the same, supervising the printing, and binding and distributing the copies shall be at such rate per folio, exclusive of the printed record furnished to him by the clerk of the court below, as the Supreme Court may from time to time prescribe. The avowed purpose of the act is to diminish the costs of proceedings on appeal, and it should be consulted at length, as set out above, Rule 23, note (*a*), only a summary of its provisions being given here.

(*d*) By the proviso to the first section of the Act of February 13, 1911, 36 Stat., 901, it is in substance enacted that in cases taken to the Court of Appeals for review, where the record has been printed as is there provided, no written or typewritten transcript shall be required; and (Sect. 2), that the same shall be the case as to such part of the record as is so printed, where the case is carried up to the Supreme Court.

(*e*) The docket fee is taxable upon a hearing on appeal. Kansas City Ft. S. & M. R. Co. v. McDonald, 60 Fed., 522. John Shillito Co. v. McClung, 66 Fed., 22. It is also taxable on an application for a mandamus in the Supreme Court. Ex parte Hughes, 114 U. S., 548. Even when a case is dismissed for want of jurisdiction an attorney fee may be taxed. Josslyn v. Phillips, 27 Fed., 481. Riser v. Southern Railway, 116 Fed., 1014. But see Smith v. Western Union Tel. Co., 81 Fed., 242.

RULE 30. MANDATE (*a*).

1. In each case finally determined (*b*) in this court, a mandate or other proper process in the nature of a procedendo shall be issued to the court below (*c*), for the purpose of informing such court of the proceedings in this court (*d*) so that further proceedings may be had in such court as to law and justice may appertain (*e*). Such mandate or other process may issue at any time on the order of the court (*f*), and, when not otherwise ordered, it shall issue as of course at the expiration of thirty days from the date of entering the final judgment or final decree of this court (*g*).

[S. C. Rule 24, Sect. 5, and Rule 39. C. C. A. Rule 32, (Rule 30 in seventh circuit) in force in various forms in all the circuits.]

(*a*) For form of mandate see 2 Loveland Fed. Forms, No. 1502. 3 Rose Fed. Proced. pp. 2979-2982.

(*b*) A case is not finally determined while a petition for a rehearing is pending. Title Guaranty & Surety Co. v. General Electric Co., 222 U. S., 401. Hook v. Mercantile Trust Co., 95 Fed., 41.

(*c*) If a stay has been allowed and is secured it continues in force until the mandate comes down. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 161 Fed., 798.

(*d*) It is by the mandate that the court below is advised of the judgment of the appellate court. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 161 Fed., 798. A direction in the mandate to proceed in accordance with the opinion filed makes the opinion a part of the mandate, as though written into it. Metropolitan Co. v. Kaw Drainage Dist., 223 U. S., 519. The court below is controlled by the mandate, and has no authority except to execute it. Ex parte Sibbald, 12 Pet., 488, 492. Ex parte Dubuque & Pacific R. R., 1 Wall., 69. Durant v. Essex Co., 101 U. S., 555. Gaines v. Rugg, 148 U. S., 228, 242. Ex parte The Union Steamboat Co., 178 U. S., 317. Schlemmer v. Buffalo &c. R. R., 220 U. S., 590. Great Northern R. R. v. Western Union Tel. Co., 174 Fed., 321. Nor can it refuse to carry out the mandate on the ground in its opinion that there is a want of jurisdiction. Brown v. Alton Water Co., 222 U. S., 325. The costs as taxed are to be inserted in the body of the mandate. Rule 23, Sect. 6, supra; and execution should be directed to issue therefor. American Trust Co. & Savings Bank v. Ziegler Coal Co., 165 Fed., 512. Where on the reversal of the judgment costs are awarded, and judgment is rendered for them under the mandate, they are beyond the control of the court below. Scatcherd v. Love, 166 Fed., 53. So costs taxed in the Court of Appeals without objection, cannot be objected to in the lower court, after the case comes down. Fidelity & Deposit Co. v. Expanded Metal Co., 183 Fed., 568. The court below cannot add interest where it has not been given by the appellate court. In re Washington & Georgetown R. R., 140 U. S., 91. The Glenochil, 128 Fed., 963. But a mandate fixing the amount which the plaintiff is entitled to recover does not prevent the court below from including in its decree the cost of suit in that court. New Orleans v. Gaines, 138 U. S., 595.

The mandate is conclusive of all points which were decided. Illinois v. Illinois Central R. R., 184 U. S., 77, 91. United States v. Camou, Ibid, 572, 574. Hence where a decree has been entered in exact accordance with the mandate a second appeal will be dismissd with costs. Aspen Mining Co. v. Billings, 150 U. S., 31, 37. Wright v. Gorman-Wright Co., 152 Fed., 408. A second appeal, raising the same question, will be regarded as frivolous. In re Kehler, 162 Fed., 674. Singer Mfg. Co. v. Adams, 185 Fed., 768. It is only where the mandate does not cover the entire case, or the court below misconstrues it, and does not give it full effect, that there may be a second appeal. Great Northern R. R. v. Western Union Tel. Co., 174 Fed., 321. If therefore a second writ of error or appeal be taken, nothing but the proceedings subsequent to the mandate can be reviewed. United States v. Camou, 184 U. S., 572, 574. United States v. New York Indians, 173 U. S., 464, 472. So where a judgment is affirmed on one writ of error and reversed on a cross writ, the questions so determined

will not be reconsidered on a subsequent writ to the second judgment. Montana Mining Co. v. St. Louis Mining & Milling Co., 147 Fed., 897.

(*e*) The court below may consider and decide whatever is left open by the mandate. Hinckley v. Morton, 103 U. S., 764. Mason v. Pewabic Co., 153 U. S., 361. In re Sanford Fork & Tool Co., 160 U. S., 247, 256. It has a certain measure of discretion also in the manner of conforming to the mandate. Davis v. Packard, 8 Pet., 324. And while the court below has no authority to modify the mandate, it has authority to construe it. Persons v. Wirgman, 140 Fed., 207. And the opinion of the appellate court may be appealed to for that purpose. In re Sanford Fork & Tool Co., 160 U. S., 247, 356. While therefore ordinarily the mandate is to be specifically obeyed, where new rights have intervened and new conditions arisen, the court below has the right and it is its duty to afford relief, this being recognized in the directions of the mandate, to take such proceedings, "as according to right and justice and the laws of the United States ought to be had." United States ex rel. Strickley v. Marshall, 122 Fed., 428. Where a decree has been entered pursuant to a mandate, permission must be obtained from the appellate court to prosecute a bill of review. Southard v. Russell, 16 How., 547. Kingsbury v. Buckner, 134 U. S., 650. Novelty Tufting Machine Co. v. Buser, 158 Fed., 83. Fellows v. Borden's Condensed Milk Co., 188 Fed., 863, 187 Fed., 1005. Kelley v. Diamond Drill & Machine Co., 136 Fed., 855. Where a judgment is reversed with a procedendo, the appellate court will not direct in the mandate the further steps to be taken, but will leave it to the lower court to decide. Exchange Ins. Co. v. Warsaw-Wilkinson Co., 185 Fed., 487. A new trial follows as a matter of course upon a reversal, without its being expressed in the mandate. Newcomb v. Burbank, 182 Fed., 954. The only remedy for prejudicial error in a trial at law in a Federal Court being a new trial the appellate court has no authority to re-examine the facts and render judgment thereon. Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed., 535. Where the only error is in the instructions with regard to damages, the court of appeals in reversing may limit a retrial to that question. Farrar v. Wheeler, 145 Fed., 482. If a decree which is reversed has been executed pending an appeal, the mandate should include a direction to the court below to award restitution. Morris' Cotton, 8 Wall, 507. Ex parte Morris & Johnson, 9 Wall., 605. Where the Supreme Court reverses the Court of Appeals which has previously reversed the District Court, the Court of Appeals is not to issue an order to the District Court, but simply communicate to it the directions given by the Supreme Court. Ex parte, First National Bank, 207 U. S., 61, 66. But this does not apply to points not covered by the decision of the Supreme Court, as to which the court below is bound by the opinion and mandate of the Court of Appeals. Hill v. Mutual Life Ins. Co., 113 Fed., 44.

A mandate may be recalled for correction. Killian v. Ebbinghaus, 111 U. S., 798. Cannon v. United States, 118 U. S., 355. American Caramel Co. v. Mills, 162 Fed., 147. Novelty Glass Co. v. Brookfield, 172 Fed., 221. But a motion to modify the mandate should be made at the same term. Schell v. Dodge, 107 U. S., 629. Le More v. United States, 131 U. S., lxxxv. Phipps v. Sedgwick, 131 U. S., cxxxix.

(*f*) Under some circumstances a mandate will be issued at once. Pacific Express Co. v. Malin, 131 U. S., 394. It is also sometimes retained to permit of an application for a certiorari to the Supreme Court. Atlantic Transport Co. v. Maryland, 196 Fed., 1004.

Where judgment has been affirmed and the mandate sent down, and application has been promptly made for a certiorari to the Supreme

Court, execution will be stayed by the District Court to await the result. Boston & Maine R. R. v. Gokey, 150 Fed., 686. But application for a stay for that purpose must be made to that court after the mandate has once issued. Oceanic Steam Navigation Co. v. Watkins, 188 Fed., 909.

(*g*) A petition for a rehearing must be made within the thirty days allowed for the purpose before the mandate goes out. Rule 27, supra. Crabtree v. McCurtain, 66 Fed., 1.

RULE 31. CUSTODY OF PRISONERS (*a*) ON HABEAS CORPUS (*b*).

1. Pending an appeal (*c*) from the final decision of any court or judge (*d*) declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

[S. C. Rule 34, Sect. 1. C. C. A. Rule 33, Sect. 1. In the seventh circuit, Rule 31.]

(*a*) By Rev. Stat., Sect. 765, the custody of the prisoner or person confined or restrained of his liberty, pending an appeal, is to be as may be prescribed by the Supreme Court (or Court of Appeals), or in default of that by the court or judge hearing the case. The present rule is in conformity with the authority so conferred. Carper v. Fitzgerald, 121 U. S., 87. From the time of the issuing of the writ, the custody of the prisoner is entirely under the control of the court which issues it, or to which the return is made. In re Kaine, 14 How., 134. Barth v. Clise, 12 Wall., 402. And any interference therewith is a contempt. United States v. Shipp., 203 U. S., 563.

(*b*) The Circuit Court of Appeals has no original independent jurisdiction in habeas corpus. Whitney v. Dick, 202 U. S., 132. In Ex parte Crawford, 154 Fed., 769, where jurisdiction was taken, the question was not raised.

(*c*) The proper mode of obtaining a review of habeas corpus proceedings is by appeal, and not by writ of error. Rice v. Ames, 180 U. S., 371. Fisher v. Baker, 203 U. S., 174. Rainbow v. Young, 154 Fed., 489. But there is no appeal in habeas corpus from the Court of Appeals to the Supreme Court, there being no amount in controversy. A certiorari is the only means of reviewing the action of the Court of Appeals in such proceedings. Whitney v. Dick, 202 U. S., 132. The Court of Appeals, however, may review on appeal the action of the District Court. United States v. Fowkes, 53 Fed., 13. Webb v. York, 74 Fed., 753. And that too even when a jurisdictional question is involved. King v. McLean Asylum, 64 Fed., 325. But see Davis v. Burke, 97 Fed., 501.

Where the constitutionality of a law of the United States or the validity or construction of a treaty is involved, and in all cases which come within section 5 of the Court of Appeals act (Act of March 3, 1891, 26 Stat., 826), an appeal lies directly from the District to the Supreme Court. Rice v. Ames, 180 U. S., 371. McKane v. Durston, 153 U. S., 684. In re Lennon, 150 U. S., 393, 399.

(*d*) See Sect. 3, note (*a*), infra.

2. Pending an appeal from the final decision of any court or judge (*a*) discharging the writ (*b*) after it has been issued,

the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

[S. C. Rule 34, Sect. 2. C. C. A. Rule 33, Sect 2. In seventh circuit, Rule 31.]

(*a*) See Sect. 3 note (*a*), infra.

(*b*) Where the writ has been discharged the prisoner is not entitled as a matter of right to go at large on bail pending an appeal. Ex parte Green, 165 Fed., 557.

3. Pending an appeal from a final decision of any court or judge (*a*) discharging the prisoner (*b*), he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

[S. C. Rule 34, Sect. 3. C. C. A. Rule 33, Sect. 3. In seventh circuit, Rule 31.]

(*a*) No appeal lies from an order of a judge sitting as a judge and not as a court, discharging a prisoner on habeas corpus. Carper v. Fitzgerald, 121 U. S., 87. Lambert v. Barrett, 157 U. S., 697. It is not a final decision from which an appeal will lie. Ex parte Jacobi, 104 Fed., 681. But an appeal and not a writ of error is the proper mode of obtaining a review, where a final decision has been made. See Sect. 1, n. (c) of this rule, supra.

(*b*) Where a prisoner is discharged on a habeas corpus simply because of a defect in the sentence, opportunity should be given to have the sentence corrected. In re Medley, 134 U. S., 160. In re Bonner, 151 U. S., 242. United States v. Carpenter, 151 Fed., 214. Substantial justice, promptly administered is ever to be the rule in habeas corpus. Storti v. Mass., 183 U. S., 138, 143.

RULE 32. MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the clerk (*a*) of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the require-

ments of this rule, and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

[S. C. Rule 33, Sects. 1 and 2. C. C. A. Rule 34, Sects. 1 and 2. In seventh circuit, Rule 32.]

(*a*) In the Supreme Court and in the Eighth and Ninth Circuits the marshal is to have the custody.

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Rules

OF THE

United States District Court

FOR THE

Middle District of Pennsylvania

In Force April 1, 1912

Including

Rules in Bankruptcy

With Notes

PREFACE

The majority of the rules in this compilation were originally adopted as Rules of the Circuit Court of the District, with the approval of the Circuit Court Judges then in Commission, Hon. George M. Dallas, Hon. George Gray, and Hon. Joseph Buffington; as well as a Committee of the Bar, consisting of Everett Warren, Esq., of Scranton, C. La Rue Munson, Esq., of Williamsport, and Charles L. Bailey, Jr., Esq., of Harrisburg. But by the recent Act of Congress (*a*) the jurisdiction previously exercised by the Circuit Courts of the United States, passed, on January 1, 1912, to the District Courts; and in view of this event, the combined rules of the two courts of the district have been brought into a single collection, in the form in which they will henceforth have to be used (*b*). Suggestive and explanatory annotations have been added, which, it is hoped, will assist in their construction and contribute to their value. The Bankruptcy Rules have not been included in this arrangement, but have been kept by themselves as covering a distinct branch.

R. W. A.

Scranton, Pa., April 1, 1912.

(*a*) Act March 3, 1911. 36 Stat., 1087-1169.

(*b*) The following order of court has been entered by Judge Witmer: "It is hereby ordered that the rules of the Circuit Court of the United States for the Middle District of Pennsylvania, be, and the same are, hereby adopted as the rules of the District Court, for said district, in so far as the said Circuit Court rules are applicable." Adopted January 1, 1912.

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(*a*) In this district the return day is the first Monday of each month.

Western District.		Middle District.	
Rule 1.	Sec. 1.	Same as Rule 1.	
1.	" 1.	" " 4.	
1.	" 5.	" " 15.	last clause.
2.	" 1.	" " 2.	
2.	" 2.	" " 4.	
3.		" " 5.	
4.		" " 8.	
7.	" 1.	" " 29.	
7.	" 1.	" " 32.	
7.	" 3.	" " 30.	
8.		" " 36.	

Western District.	Middle District.
Rule 8.	Same as Rule 38.
9. Sec. 1.	" " 39.
9. " 2.	" " 35.
9. " 2.	" " 40.
9. " 4.	" " 42.
9. " 5.	" " 42.
9. " 6.	" " 43.
10. " 1.	" " 45.
10. " 2.	" " 44.
11. " 2.	" " 51.
11. " 3.	" " 51.
11. " 5.	" " 50.
11. " 6.	" " 48.
13. " 1.	" " 71.
13. " 3.	" " 71.
14. " 3.	" " 27.
17. " 1.	" " 20.
17. " 2.	" " 10. and 60.
17. " 3.	" " 10.
17. " 4.	" " 10.
20.	" " 61.
20.	" " 62.
21.	" " 67.
24. " 2.	" " 69.
25.	" " 88. (*a*)
27.	" " 78.
28.	" " 24.
28. " 1.	" " 70.
29.	" " 85.
29.	" " 86.
31.	" " 90.
32 to 40.	" " 55.
37 to 40.	" " 54.
42.	" " 30.

(*a*) In this district the return day is the first Monday of each month.

INTRODUCTION.

The Middle District of Pennsylvania was created by Act of Congress of March 2, 1901 (*a*); and embraces thirty-two counties, eleven of which were taken from the Eastern, and twenty-one from the Western District, as follows:

EASTERN.	WESTERN.	
Adams.	Bradford.	Mifflin.
Carbon.	Cameron.	Montour.
Cumberland.	Centre.	Northumberland.
Dauphin.	Clinton.	Potter.
Franklin.	Columbia.	Snyder.
Lebanon.	Fulton.	Sullivan.
Monroe.	Huntington.	Susquehanna.
Perry.	Juniata.	Tioga.
Pike.	Lackawanna.	Union.
Wayne.	Luzerne.	Wyoming.
York.	Lycoming.	

The Courts of the District were opened at Harrisburg, May 6, 1901 (*b*); up to which time, by the provisions of the Act, the jurisdiction and authority of the Courts and officers of the Eastern and Western Districts over the territory taken from each remained unchanged (*c*).

Terms of the Court are required to be held at Williamsport on the second Monday of January and the second Monday of June; at Scranton on the fourth Monday of February and the third Monday of October; and at Harrisburg on the first Monday of May and the first Monday of December (*d*), in each year.

(*a*) 31 Stat. c. 801, p. 880.
(*b*) Ibid, Sect. 10.
(*c*) Ibid, Sect. 7.
(*d*) Act June 30, 1902, Sect. 1, 32 Stat. c. 1335, p. 549.

The records are directed to be kept at Scranton (*e*); but the clerk is required to maintain an office in charge of himself

or a deputy at Harrisburg (*f*); and the Court is authorized to provide by rule for the keeping of provisional or temporary records at Harrisburg and Williamsport of such actions, suits, or proceedings, as may be entered or brought at either place (*g*). Civil suits instituted at Harrisburg are to be tried there, if that is the nearest place of holding Court to the residence of either party, unless by consent they are tried elsewhere (*h*).

Previous to the creation of the Middle District, the Courts of the Western District were held at Williamsport (*i*), and at Scranton (*j*); and records of the Circuit, but not of the District Court, were kept at both places. The records at Williamsport still remain there, in charge of the resident deputy clerk (*k*); but those at Scranton are made records of the Middle District, and appropriate proceedings may be had upon them at that place (*l*).

(*e*) Act June 30, 1902, Sect. 2, 32 Stat., p. 549.
(*f*) Act March 3, 1911, Sect. 103. 36 Stat., 1123.
(*g*) Act June 30, 1902, Sect. 2, 32 Stat. c. 1335, p. 549.
(*h*) Act March 3, 1911, Sect. 103, 36 Stat., 1123.
(*i*) Act May 26, 1824, 4 Stat., c. 170, p. 50.
(*j*) Act August 5, 1886, 24 Stat., c. 931, p. 336.
(*k*) Act June 30, 1902, Sect. 2, 32 Stat., c. 1335, p. 549.
(*l*) Act March 2, 1901, Sect. 9, 31 Stat., p. 882. Act June 30, 1902, Sect., 2, 32 Stat., 549.

ACCOUNTS.

[See Auditors.]

ADMISSIONS DISPENSING WITH EVIDENCE.

Rule 1. In all actions (*a*) upon any bond, bill note, draft, check (*b*) or other instrument of writing for the payment of money, or any deed, mortgage, or recognizance, including an assignment of the same, a copy of which has been filed with the plaintiff's statement, it shall not be necessary for the plaintiff at the trial to prove the execution thereof, or the hand-writing of the makers, drawers, acceptors, endorsers, or demand, non-acceptance, non-payment, protest, or notice of dishonor; but the same shall be taken to be admitted, unless the defendant by affidavit filed at or before the time of filing his plea, shall deny such execution or hand-writing, or that demand was made, and acceptance or payment refused, or protest and notice duly given.

[East. Dist. (Pa.), Rule 1, Sect. 1. West. Dist., Rule 1.]

(*a*) This rule does not apply to a suit against executors or administrators. Perkins v. Humes, 200 Pa., 235.

(*b*) An unaccepted check cannot be made the subject of a suit by the payee against the bank on which it is drawn, even though the maker has enough money on deposit to pay it. Tibby Bros. Glass Co. v. Farmers & Mechanics Bank, 220 Pa., 1.

Rule 2. In all actions, founded in whole or in part on a book account (*a*), if the plaintiff shall file with his statement a copy of the book entries relied upon, together with the credits which he admits the defendant is entitled to, verified by affidavit that such account is correctly copied from his books of original entry, the account shall be taken to be admitted, unless the defendant by affidavit, at or before the time of filing his plea, shall deny the same, or the items or parts thereof which he disputes; and in case of the denial of a part, is shall not be necessary to prove the remainder; provided, that the defendants shall not be confined to the items of credit which are so given by the plaintiff.

[West. Dist. (Pa.), Rule 2, Sect. 1.]

(*a*) A copy of the book account attached to the plaintiff's statement does not permit the whole statement to be offered in evidence, but only the book account. Knowlan v. Clopp, 29 Pa. Sup. Ct., 424.

Rule 3. In case the plaintiff shall not have filed with his statement the copy provided for in Rules 1 and 2, he may thereafter file the same and serve a copy thereof on the defendant or his attorney, not less than thirty days prior to the time set for trial; and unless the defendant shall, within fifteen days thereafter, by affidavit duly filed and served, deny the same as provided in said rules, it shall be taken to be admitted in the same manner and to the same extent as is there provided.

Rule 4. Rules 1 and 2 shall apply to a specification or plea of set off or counter claim by the defendant, based upon a similar instrument of writing or book account, of which due notice in writing shall be given to the plaintiff; the plaintiff's affidavit in denial thereof being required to be filed within fifteen days thereafter.

[East. Dist. (Pa.), Rule 1, Sect. 1. West. Dist., Rule 1, Sect. 2, and Rule 2, Sect. 2.]

Rule 5. In all actions by or against partners, it shall not be necessary at the trial to prove the partnership, but the same shall be taken to be admitted as alleged of record, unless one or more of the defendants, by affidavit, filed at or before the time of filing their plea, shall deny the existence of such partnership, and shall state what if any relation they bear to the subject matter of the action, and whether a partnership exists with respect to the same, and, if so, who are the parties to it, if known.

[East. Dist. (Pa.), Rule 1, Sect. 2. West. Dist., Rule 3.]

Rule 6. Similarly, in any action by or against a corporation, it shall not be necessary to prove the fact of incorporation, but the same shall be taken to be admitted, unless denied by the defendants, by affidavit similarly filed.

By Act June 24, 1885 (Pa.), P. L., 149, the existence of the corporation shall be taken to be admitted unless put in issue by the pleadings; and when there is no denial of the averment of incorporation, the defendant will be precluded from alleging that the corporation is dissolved. Monongahela Bridge Co. v. Pittsburg Traction Co., 196 Pa., 25.

Rule 7. Whenever any written exhibit is offered in the taking of depositions, or the hearing of evidence before a commissioner, auditor, examiner, or referee, a copy thereof, attached to such depositions, or to the evidence reported or returned by such commissioner, auditor, examiner or referee,

and certified to be a true copy of the original as so produced, may be read upon the trial of the cause, or upon the argument of any motion or rule, where the original itself would be evidence, without the further production thereof, unless due notice to produce it shall have been given ten days prior to the time fixed for the trial or argument; and provided that the genuineness of the original is not in dispute.

This is an appropriate rule. 13 Cyc., 939. As justifying it, there may be cases where the original exhibit cannot be attached. Jackson v. Shepherd, 6 Cow. (N. Y.), 444.

A witness who has produced a paper at the taking of his depositions is not bound to surrender it, or to do more than permit a copy to be made. Smith v. Nat'l Bank, 193 Fed., 255.

Rule 8. Where, in any action, either party may desire to give in evidence any written document, not directly put in issue by the pleadings, and neither admitted nor denied therein, he shall be entitled, upon praecipe, to a rule on the opposite party to admit the execution thereof, the document in question being deposited with the clerk, pending the rule, and subject to inspection there; and if the opposite party shall not, within fifteen days of the service of the rule, admit in writing the execution of the document, the court, in its discretion, may order him to pay the cost of making proof thereof, if it shall appear that he unreasonably neglected or refused to comply with the rule.

Provided, however, that no such admission, if made, shall be construed to extend to the competency or relevancy of such document, but only to its genuineness, or that it is what, on its face, it purports to be.

[West. Dist. (Pa.), Rule 4.]

Rule 9. Upon obtaining a rule to show cause, founded on a petition or affidavit, a copy of the same, together with the rule, shall be served upon the opposite party or his attorney; and upon failure of such party to make answer thereto, under oath, within 15 days after service of the rule, denying the same, the facts stated therein shall be taken to be admitted for the purpose of such rule. If answer is made, but there is only a partial denial, the facts shall be taken to be admitted to the extent that they are not denied.

A rule of this character was enforced in Russell's Appeal, 93 Pa., 384.

AFFIDAVIT OF DEFENCE (*a*).

Rule 10. Sect. 1. In all actions of assumpsit (*b*) or of scire facias, the plaintiff, having filed a declaration or statement of his demand, as required by these rules, shall be entitled to judgment unless the defendant shall file a sufficient affidavit of defence thereto (*c*), as follows:

If the plaintiff has served his writ and a copy of his statement on the defendant, not less than fifteen days before the return day of the writ, and if the defendant has not filed an affidavit of defence on or before the return day (*d*), the plaintiff may, after the return day, move for judgment in the office of the clerk, and judgment shall be entered by the clerk, who shall assess the debt or damages in all cases in which the amount thereof is set forth with certainty in the statement of the plaintiff, or can be rendered certain by computation.

[West. Dist. (Pa.), Rule 17, Sects. 2, 3 and 4.]

(*a*) For authority of the court to make this and the following kindred rules, see Standard Underground Cable Co. v. Johnstown Tel. Co., 26 Pa. Sup. Ct., 432. Under the Pennsylvania practice an affidavit of defence is not a pleading, nor is it the equivalent of an answer under code pleading. Its sole purpose is to prevent a summary judgment, and hence it need not set up the defendant's whole case, but only enough to prevent the taking of judgment. U. S. v. Schofield, 182 Fed., 240. But this is not true where what is known as the Allegheny rule is in force.

(*b*) By statute in Pennsylvania (Act May 25, 1887, P. L., 271), the distinction between actions ex contractu is abolished, and demands, theretofore recoverable, in debt, assumpsit or covenant, are thereafter to be sued for and are made recoverable in a single form of action called assumpsit. But notwithstanding this, an affidavit of defence is not required in an action of assumpsit for breach of promise of marriage. Zimmerman v. Drake, 17 Dist. (Pa.), 754. Nor for a penalty. Bartoe v. Guckert, 158 Pa., 124, Osborn v. First Nat. Bank, 154 Pa., 134. Commercial Nat'l Bank v. Kirk, 222 Pa., 567. Nor for damages for the negligent performance of a contract. Corry v. Pa. R. R., 194 Pa., 516. Brady v. Osborn Engineering Co., 132 Fed., 412. Nor where the action is of a mixed character, part contract and part tort. Kinney v. Mitchell, 136 Fed., 773. Nor on an order for reparation, made by the Interstate Commerce Commission, for excessive freight charges. Naylor v. Lehigh Valley R. R., 188 Fed., 860. It is no objection, however, that the case sounds in damages, where they may be liquidated with certainty. Commonwealth v. Yeisley, 6 Pa. Sup. Ct., 273. And although the plaintiff states a claim in trespass, he is entitled to an affidavit, where the facts show that he may recover in assumpsit as well. Duffield v. Rosenzweig, 144 Pa., 520.

(*c*) The filing of an affidavit of defence is a waiver of formal defects in the statement. Felty v. Natl. Acc. Soc., 139 Fed., 57.

(*d*) An affidavit of defence may be filed as of right at any time before judgment. Calehuff v. Driver, 46 Pa. Sup. Ct., 79. Bordentown Banking Co. v. Restein, 214 Pa., 30.

Sect. 2. Similarly in replevin (*a*), if the writ shall have been served fifteen days before the return day, the defendant or party intervening as such shall within fifteen days after the filing of the plaintiff's declaration and service of a copy thereof upon him, file an affidavit of defence, setting up the facts denying the plaintiff's title to the goods and chattels in controversy, and showing his own title thereto, and in the event of his failure so to do, the plaintiff, at any time after the return day (*b*), upon proof of such service, shall be entitled to judgment, to be entered by the clerk.

(*a*) This is regulated in Pennsylvania as to replevin by Act 19 April, 1901, Sects. 4 and 5, P. L. (Pa.), 89; and the rule conforms to the state practice. Griesmer v. Hill, 225, Pa., 545.

But the act does not apply to landlord and tenant cases which are still governed by the Act of March 21, 1772. Williams v. Rutherford, 14 Dist. (Pa.), 282. Rosenfeld v. Goldberg. Ibid, 381. But see Crawford v. Fulmer, Ibid, 487.

(*b*) It is not necessary under the statute that a return day intervene. Griesmer v. Hill, 36 Pa. Sup. Ct., 69.

Rule 11. In the actions mentioned in the foregoing rule, if the plaintiff fails to file and serve his declaration or statement, at the time and in the manner there stated, he may file and serve the same at any time thereafter, and if the defendants shall not file an affidavit of defence within fifteen days after such service (*a*), the plaintiff shall be entitled to judgment, not sooner however than the return day of the writ (*b*).

[See Act May 25, 1887, Sect. 6.]

(*a*) Where there is more than fifteen days between the service of the copy of the statement, and entry of judgment, and a return day has intervened, the judgment is good. Weigley v. Teal, 125 Pa., 498. Marlin v. Waters, 127 Pa., 177. Newbold v. Pennock, 154 Pa., 591.

(*b*) Judgment cannot be entered by default for want of an affidavit of defense until fifteen days after the return day, where the summons was not served until that day, even though the statement and rule to file an affidavit of defence was entered and served before that time. Commonwealth v. Bangs, 22 Pa., Sup. Ct., 403. Hanna v. Massey, 20 Dist. (Pa.), 921.

An affidavit of defence may be filed as of right at any time before judgment. Calehuff v. Driver, 46 Pa. Sup. Ct., 79. Bordentown Banking Co. v. Restein, 214 Pa., 30.

Rule 12. Service of the declaration or statement, provided in the foregoing rules, shall be by copy (*a*), and shall be made as follows:

(a). By the marshal with the writ, in which case his return shall be accepted in lieu of the affidavit of service otherwise required.

(b). By any competent person, upon the defendant, in the manner prescribed by law for the service of the writ, or upon his attorney of record, personally.

(c). If the defendant resides out of the district, and has no attorney of record therein, service may be made upon him, wherever found, by messenger or registered letter.

(d). If the defendant's residence is unknown, and he has no attorney of record within the district, service may be made by leaving with the clerk a copy of the statement, marked "defendant's copy," which shall be delivered to the defendant or his attorney upon the entry of an appearance.

An affidavit of the time, place, and manner of service, shall be filed in all cases, except where it is made by the marshal; and in case of service by registered letter it shall be accompanied by the post-office return receipt.

(*a*) The service of a copy of the plaintiff's statement is a sufficient compliance with the statute with regard to notice of filing. Standard Cable Co. v. Johnstown Telephone Co., 26 Pa. Sup. Ct., 432.

Rule 13. In an action against an executor or administrator, no affidavit of defence shall be required, where the defendant shall suggest, under oath, that the cause of action and the defence thereto arose in the lifetime of the decedent (*a*). And the same rule shall apply, where an action is defended by the committee of a lunatic (*b*), or by a guardian (*c*), trustee (*d*), or receiver (*e*), and the matters involved occurred prior to his appointment.

(*a*) An executor or administrator cannot ordinarily be required to file an affidavit of defence. Seymour v. Hubert, 83 Pa., 346. Mutual Life Ins. Co. v. Tenan, 188 Pa., 239. This exemption, however, does not extend to cases where the cause of action arose after the death of the decedent, and relates to transactions in which the personal representative took a part. Palairet v. Fidelity Co., 16 W. N. C., 146. Miller's Petition, 3 Dist. (Pa.), 393. Reakirt v. Flannagan, 6 Dist. (Pa.), 402. But an administrator de bonis non is within the rule, where the cause of action arose under his predecessor. Johnston v. Shurtleff, 1 Lacka. Leg. News, 255.

(*b*) Alexander v. Ticknor, 1 Phila., 120. Ash v. Conyers, 2 M., 94.

(*c*) But where the proceedings are in rem and the guardian has custody, and is able to ascertain all the facts, as fully as if the property was his own, judgment may be taken for want of an affidavit. Charlton v. Allegheny City, 1 Grant (Pa.), 208.

(*d*) A trustee in bankruptcy is not necessarily absolved from filing an affidavit. Booth v. Wolff Process Leather Co., 224 Pa., 583.

(*e*) Hays v. Railroad, 27 Pittsburg Leg. Jour., 105. The general rule is, that a receiver, as an officer of the Court and acting in a representative capacity, is exempt. Speck v. Lansdale & Norristown Ry.,

21 Montg., 215. And the same is true as to an assignee for the benefit of creditors. Boyd v. Moir, 7 Montg., 50. Nor will an affidavit be required of the widow and heirs of a decedent, brought in on a scire facias to revive. Stadelman v. Pa. Trust Co., 12 Phila., 332. Lewis v. Quigley, 1 Lehigh, 188.

Rule 14. Every affidavit shall be in the first person, and shall be divided into convenient paragraphs, consecutively numbered, each being devoted as nearly as may be to a single subject. It shall be made by the defendant, when practicable (*a*); and if by one of several defendants on behalf of all, it shall so state. Where made by a person who is not a party to the record the reason shall be given (*b*), which, if not sufficient, the affidavit may be excepted to on that ground. If the defendant is a corporation (*c*), the affidavit may be made by any officer, agent, or employee, having the requisite knowledge and authority, which must appear.

(*a*) Where the affidavit is made on information and belief, it should aver the ability of the defendant to prove the facts so alleged. Banning v. Murphy, 226 Pa., 568.

(*b*) Where the affidavit is made by a stranger to the record, the reason should appear. Griel v. Buckius, 114 Pa., 187. Citizens Natural Gas Co. v. Waynesburg Natural Gas. Co., 210 Pa., 137. Phillips v. Allen, 32 Pa., Sup. Ct., 356.

(*c*) This does not include municipal corporations, which are relieved by statute. Act April 26, 1893, P. L. (Pa.), 26; except where a part of the claim is admitted to be due. Act May 3, 1909, P. L., 394.

Rule 15. Where defence is made to a part only of the plaintiff's claim, the affidavit shall state to what part, and tender judgment for the balance; and thereupon the plaintiff may take judgment and have execution for the amount so admitted to be due (*a*); or, in the action of replevin, for the goods admitted to be the property of the plaintiff (*b*). But if the plaintiff refuses to accept, in satisfaction of his claim (*c*), the judgment tendered, and proceeds for the balance, he shall pay the costs which subsequently accrue, unless he recovers more than the judgment tendered.

[As to last clause of the rule, see West. Dist. (Pa.), Rule 1, Sect. 5.]

(*a*) Act May 31, 1893, P. L. (Pa.), 185. Judgment for the part of the plaintiff's claim admitted to be due, must be strictly confined to that which is so admitted. United Oil Cloth Co. v. Dash, 32 Pa. Sup. Ct., 155.

(*b*) Act April 19, 1901, Sect. 5, P. L. (Pa.), 89.

(*c*) Care should be taken to state in the praecipe for judgment whether it is accepted in full satisfaction or pro tanto only. Coleman

v. Nantz, 63 Pa., 178. Stedman v. Poterie, 139 Pa., 100. Taber v. Olmsted, 158 Pa., 351.

Rule 16. Where an affidavit is filed to the whole of the plaintiff's claim, but is adjudged by the court to be insufficient as to a portion of it, the plaintiff may take judgment and have execution for such portion, and proceed for a recovery of the balance, the same as if no such judgment had been entered (*a*).

(*a*) Act July 15, 1897, P. L. (Pa.), 276. To justify judgment for a part of the plaintiff's claim, the court should adjudge what portion of the affidavit of defence it considers insufficient. Pierson v. Krause, 208 Pa., 115. The items as to which it is claimed that the affidavit of defence is insufficient should be enumerated in the rule for judgment, or specially indicated by the court in its adjudication. Law v. Waldron, 230 Pa., 458. The plaintiff is not entitled to judgment for a part, on a rule for judgment as to the whole of his claim. Faux v. Fitler, 223 Pa., 568.

As to partial judgments in actions of replevin, see Act April 19, 1901, Sect. 5, P. L., 89.

Rule 17. Where an affidavit of defence is considered insufficient in form or substance, exceptions may be filed thereto, particularly stating in what respect it is objectionable; and thereupon a rule shall be entered on the defendant to show cause why the plaintiff should not have judgment notwithstanding the affidavit of defence (*a*); and if, after argument, the Court shall be of opinion, that the exceptions are well taken, judgment may be entered for the plaintiff, or a supplemental affidavit be ordered (*b*).

(*a*) It is too late to enter a rule for judgment for want of a sufficient affidavit of defence after any step has been taken in the case calculated to induce the belief that the affidavit has been accepted as sufficient. Thompson v. Donaldson, 43 Pa. Sup. Ct., 585.

But where judgment has not been asked for, an affidavit of defence may be withdrawn and a demurrer interposed. Ewald v. Coe, 15 Dist. (Pa.), 102.

(*b*) No writ of error can be taken in the Federal Courts to the refusal of judgment for want of a sufficient affidavit of defence; this being an interlocutory order. Shumaker v. Security Life & Annuity Co., 159 Fed., 112. On a rule for judgment for the whole of the plaintiff's claim, he is not entitled to judgment for a part as to which the affidavit is possibly deficient. Faux v. Fitler, 223 Pa., 568.

APPEARANCES.

Rule 18. Appearances (*a*) by attorney shall be by praecipe to the clerk, who shall file and note the same of record (*b*), and enter the name of the attorney on the margin of the docket, opposite the name of the party for whom he appears (*c*).

[East. Dist. (Pa.), Rule 19, Sect. 3.]

(*a*) On the general subject of appearances, see 3 Cyc., 500-535. 1 Foster's Fed. Prac., Sects. 99-102. 1 Troubat & Haly's Prac., Sect. 271. A general appearance waives all mere defects and irregularities; 3 Cyc., 514-520. 1 Foster's Fed. Prac., Sect. 101; including want of service. Creighton v. Kerr, 20 Wall., 8; Jewett v. Garrett, 47 Fed., 625; or the objection that the defendant does not reside in the district. Interior Construction Co. v. Gibney, 160 U. S., 217. Western Loan Co. v. Butte Mining Co., 210 U. S., 368. But not matters, which go to the Court's jurisdiction over the subject in controversy. United States v. Yates, 6 How., 606. Creighton v. Kerr, 20 Wall., 8. Romaine v. Union Ins. Co., 28 Fed., 625. 3 Cyc., 515. 3 Cent. Dig., title, Appearances, Sect., 76.

(*b*) The defendant may reserve his rights by appearing specially; as to move the Court to set aside the service of process. Harkness v. Hyde, 98 U. S., 476; or to call attention to other irregularities by which jurisdiction is sought to be obtained over him. Goldey v. Morning News, 156 U. S., 518. Wabash R. R. v. Brow, 164 U. S., 271. Citizens Sav. & Trust Co. v. Illinois Cent. R. R., 205 U. S., 46. United States v. American Bell Tel. Co., 29 Fed., 17. Internat'l Wireless Tel. Co. v. Fessenden, 131 Fed., 491. But the taking of any step without this, by which it is recognized that the case is in Court, will amount to a general appearance, and bring the party in for all purposes. 3 Cyc., 504. New Jersey v. New York, 6 Pet., 323. Jones v. Andrews, 10 Wall., 327. Texas Pac. R. R. v. Cox, 145 U. S., 593. Lycoming Ins. Co. v. Storrs, 97 Pa., 354. Byers v. Byers, 208 Pa., 23. And this is the effect of a demurrer calling for a judgment on the merits. St. Louis R. R. v. McBride, 141 U. S., 127. Western Loan Co. v. Butte Mining Co., 210 U. S., 368. Peale v. Marian Coal Co., 172 Fed., 639. Nelson v. Husted, 182 Fed., 921. Order of Commercial Travelers v. Bell, 184 Fed., 298; or the setting up of a counter claim. Merchants Heat & Light Co. v. Clow, 204 U. S., 286; or joining in a prayer for a receiver. Horn v. Pere Marquette R. R., 151 Fed., 626. But not necessarily, of a removal from the State Courts. Wabash R. R. v. Brow, 164 U. S., 271; the defendant having the right to remove for the very purpose of objecting. Goldey v. Morning News, 156 U. S., 518. Davis v. Cleveland &c. R. R., 146 Fed., 403. Flint v. Coffin, 176 Fed., 872. And the defendant is not bound, as by a general appearance, by pleading to the merits, after his objections, upon due exception, have been overruled. Harkness v. Hyde, 98 U. S., 476. Southern Pac. Co. v. Denton, 146 U. S., 202. St. Louis & Santa Fe R. R. v. Loughmiller, 193 Fed., 689. Nor by a mere argument of the merits on a hearing with regard to the sufficiency of pleas to the jurisdiction. Citizens Sav. & Trust Co. v. Illinois Central R. R., 205 U. S., 46.

(*c*) The effect of a general appearance cannot be recalled, by the withdrawal of that by which it was brought about, even though it be done with leave. Eldred v. Bank, 17 Wall., 551. Creighton v. Kerr,

20 Wall., 8. Nor should leave to withdraw be given without notice. Daley v. Iselin, 212 Pa., 279.

Rule 19. No special appearance shall be entered without leave of Court, the purpose of which shall be stated in writing and filed of record at the time.

A Court may make and enforce such a rule. Mahr v. Union Pacific R. R., 140 Fed., 921. A special appearance, under the Federal practice, is not to be confused with an appearance de bene esse, which is peculiar to the Pennsylvania law. Blair v. Weaver, 11 S. & R., 84. See the two defined. 3 Cyc., 502. See also Taylor v. McCafferty, 27 Pa. Sup. Ct., 122.

A defendant is entitled to reserve his rights, by appearing specially; as to move the Court to set aside the service of process. Harkness v. Hyde, 98 U. S., 476. Flint v. Coffin, 176 Fed., 872; or to call attention to other irregularities affecting the jurisdiction of the Court. Goldey v. Morning News, 156 U. S., 518. Wabash R. R. v. Brow, 164 U. S., 271. Clark v. Wells, 203 U. S., 164. Citizens Savings & Trust Co. v. Illinois Central R. R., 205 U. S., 46. United States v. Amer. Bell Tel. Co., 29 Fed., 17. Internat'l Wireless Tel. Co. v. Fessenden, 131 Fed., 491.

A party who appears specially cannot be compelled, by rule of Court, to agree, that, if the objection which he makes is overruled, his appearance shall be taken as a general one. Davidson Marble Co. v. Gibson, 213 U. S., 10.

But an application for relief of any kind, as for an extension of time in which to answer, will amount to a general appearance unless it be otherwise specially noted at the time. Murphy v. Herring Safe Co., 184 Fed., 495. A mere demand for a copy of the complaint under the New York practice is at most only a special appearance. Hoyt v. Ogden Portland Cement Co., 185 Fed., 889.

Rule 20. In actions of assumpsit, trespass, and scire facias (*a*), the plaintiff having filed his declaration or statement prior to the return day of the writ, shall be entitled to judgment, at any time thereafter, for want of an appearance (*b*), to be entered by the clerk (*c*); provided the writ shall have been served ten days prior to the time of taking judgment.

[West. Dist. (Pa.), Rule 17, Sect. 1.]

(*a*) Judgment for want of an appearance, in the actions named, is regulated in Pennsylvania by statute. Act June 13, 1836. Sects. 33 and 34. P. L., 578. The two essentials are, that the plaintiff shall have filed his declaration or statement before the return day; and that the defendant, having been served within the jurisdiction, shall have had ten days in which to appear. Fitzsimons v. Salomon, 2 Binn., 436. Foreman v. Schricon, 8 W. & S., 43. Dennison v. Leech, 9 Pa., 164. Black v. Johns, 68 Pa., 83. Kohler v. Luckenbaugh, 84 Pa., 258. When the declaration is not filed before the return day, the only thing the plaintiff can do is to enter a common appearance and rule the defendant to plead. Foreman v. McFerrin, 13 S. & R., 290. Seidel v. Hurley, 1 Wood. Dec., 352. Hanna v. Massey, 20 Dist. (Pa.), 921.

Judgment for want of an appearance cannot be taken in replevin. Crofut v. Chichester, 3 Phila., 457; the plaintiff being confined to entering a common appearance and ruling the defendant to plead. Act April 19, 1901, Sect. 5, P. L., 90.

In ejectment the defendant does not have to appear until the second term, and judgment for want of an appearance cannot be entered against him until that time. Act March 21, 1806. 4 Sm. Laws, 332. Act April 13, 1807, Sect. 2. 4 Sm. Laws, 476. Vanderslice v. Garven, 14 S. & R., 273. Young v. Cooper, 6 W. N. C., 43. And this has not been changed by the Act of May 8, 1901, P. L., 142. Lorenz v. Berry, 207 Pa., 296.

For judgment for want of an appearance in attachment executions, see Rule 26, infra.

The establishment of monthly return days has not changed the practice as to entering judgment on two returns of nihil to writs of scire facias. Magaw v. Stevenson, 1 Grant (Pa)., 402. Stevens v. North Penn. Coal Co., 35 Pa., 265. Haupt v. Davis, 79 Pa., 238.

On the general subject of judgment for want of an appearance, see Commonwealth v. Lehigh Val. R. R., 165 Pa., 162.

(*b*) As to what is to be taken as equivalent to an appearance, see Myler v. Wittish, 204 Pa., 180. Where an appearance is entered and afterward withdrawn, the case may be treated as though there were no appearance, and judgment by default be rendered. Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S., 603.

(*c*) In ejectment, application for judgment for want of an appearance must be made to the Court. Thompson v. Owen, 8 Kulp, 36.

ARGUMENTS.

Rule 21. The Court, by standing order, being always open, cases may be argued at any time, at the convenience of counsel. Where the time cannot be agreed upon, it will be fixed by the court by special order, on the application of either party.

[As to the Court being opened every day see Rule 87.]

Rule 22. Where testimony is required for the disposition of a case upon argument, it shall be taken by depositions upon a rule for that purpose to be entered ex parte, as of course.

[East. Dist. (Pa.), Rule 7, Sect. 4.]

See also Rule 53, infra. A rule of this kind is justified. Importers Nat'l Bank v. Lyons, 134 Fed., 510. Despeaux v. Pennsylvania R. R., 147 Fed., 926.

The provision for an allowance of an attorney fee of $2.50 for each deposition taken and admitted has reference to depositions admitted at the trial or final hearing of the case and not to depositions taken for an interlocutory purpose. Michigan Aluminum Foundry Co. v. Aluminum Co., 190 Fed., 903.

Rule 23. Arguments shall be oral, printed or typewritten briefs of the points intended to be made and the authorities relied on being furnished at the time to the court and the opposing counsel. The moving party, or party having the affirmative of the question, shall begin and conclude, arguing the case fully in the opening argument, and being confined in conclusion to a reply.

[East. Dist. (Pa.), Rule 16.]

Rule 24. In equity cases, the record and briefs of counsel if so ordered shall be printed for the use of the Court, the record being printed by the clerk and the expense taxed, as a part of the costs to be paid by the losing party. Before printing the record the clerk shall make an estimate of the expense and notify each party of the amount with which he is chargeable, which, subject to subsequent adjustment, shall be paid by such party before his part is printed. And upon the failure of either party to so pay the estimated amount within a reasonable time, that part of the record will not be considered.

[West. Dist. (Pa.), Rule 28. C. C. A. Rule 23.]

Where there is an established practice of printing the record, it has the effect of a rule, and the printing bill will be taxed against the losing party. Detroit Heating Co. v. Kemp, 182 Fed., 847.

But there must be a rule or its equivalent to make the printing taxable. Keasbey Co. v. American Magnesia Co., 149 Fed., 439.

The record as printed may be used on appeal. C. C. A. Rule 23, Sect. 8. See also Act Feb. 13, 1911, 36 Stat., 901.

ATTACHMENTS.

Rule 25. All remedies by attachment or other like process which are given by the laws of the State of Pennsylvania in common law cases, are hereby adopted and made applicable to such cases in this Court, preliminary affidavits or proofs being made, and security furnished, the same as is there required.

This rule is expressly authorized by Rev. Stat., Sect. 915. In the absence of a showing to the contrary it will be presumed, on appeal, that the state law with regard to attachments has been adopted without a formal rule. Citizens Bank v. Farwell, 56 Fed., 570. The exercise of the jurisdiction so conferred draws with it whatever is incidental thereto, even though other parties, not otherwise subject to the jurisdiction of the Court, may be affected thereby. Gumbel v. Pitkin, 124 U. S., 131. An attachment being merely an incident, if the suit cannot be maintained for want of jurisdiction over the defendant, the

attachment falls. Laborde v. Ubarri, 214 U. S., 173. United States v. Brooke, 184 Fed., 341. The Federal Courts can acquire no jurisdiction therefore, by foreign attachment over a non-resident debtor, not served with process, even though that be the state law. Central Trust Co. v. Chattanooga R. R., 68 Fed., 685. With this exception the Federal Courts administer the law of attachments, as it is laid down by the state. Perez v. Fernandez, 202 U. S., 80, 97. Bates v. Days, 17 Fed., 167.

Where there are two or more districts in a state, an attachment execution runs into all. Prevost v. Gorrell, 5 W. N. C., 151. Act March 3, 1911, Sect. 53. 36 Stat., 1101.

Rule 26. The plaintiff in an attachment execution shall be entitled to judgment against the garnishee for want of an appearance (*a*) at any time after the return day (*b*), provided the writ shall have been served ten days prior to the time of taking judgment (*c*).

(*a*) For form of judgment for want of an appearance in case of an attachment, see Layman v. Beam, 6 Whart., 181. Jones v. Tracy, 75 Pa., 420. Longwell v. Hartwell, 164 Pa., 533. The judgment establishes that the garnishee has in his hands the property attached. Lorenz v. King, 38 Pa., 93. But where the attachment and the return are general, the judgment by default is interlocutory merely, and the plaintiff must establish, by writ of inquiry, the possession by the garnishee of the goods or credits relied on, and their nature and value. It is only where money or a debt is attached, the amount of which is specified in the return, that the requisites for a final judgment appear. Longwell v. Hartwell, 164 Pa., 533.

(*b*) The matter of appearing is left largely to the discretion of the Court. Struemple v. Sausser, 8 Dist. (Pa.), 53. The act of assembly simply requires the garnishee "to appear at the next term of the Court, or at such other time as the Court * * * shall appoint." Act June 16, 1836, Sect., 35. P. L., 767. Where the defendant appears in Court personally or by counsel on the hearing of a motion to dissolve, and being served with a rule to plead files an answer and demurrer, this is equivalent to a formal appearance. Myler v. Wittish, 204 Pa., 180.

(*c*) The writ does not need to issue and be returned ten days prior to the return day. Shaeffer v. Wilson, 1 Chest. Co., 161. Struemple v. Sausser, 8 Dist. (Pa.), 53.

Rule 27. In an attachment execution, the plaintiff may file with his praecipe, to be served with the writ or afterwards, interrogatories to be exhibited to the garnishee, and thereupon enter a rule as of course to answer the same, returnable not earlier than the return day of the writ (*a*); and due service of the writ having been made on the garnishee, and the rule and interrogatories having also been served (*b*) not less than fifteen days before the return day of said rule, judgment may be entered against the garnishee by default, if he neglects or refuses to answer the same (*c*). Or if he answers admitting

property of the defendant in his hands, judgment may be taken for the amount so admitted (*d*).

[West. Dist. (Pa.), Rule 14, Sect. 3.]

(*a*) The interrogatories may be served with the writ, but the garnishee is not bound to answer until the return day. Crammond v. Trustees, 4 S. & R., 147.

(*b*) Service of the interrogatories and rule does not have to be made by an officer. Ringwalt v. Brindle, 59 Pa., 51.

(*c*) On failure of the garnishee to answer, the judgment to be entered is, that he has "in his possession goods and effects of the defendant liable to such writ of attachment to an amount or value sufficient to satisfy the demands of the plaintiff, together with all legal costs of suit and charges." Act June 13, 1836, Sect. 57. P. L., 582. And thereupon execution may issue against the garnishee in like manner, as in the case of a judgment rendered against him for his own proper debt. Ibid. The plaintiff may also have execution against the garnishee, as for his own proper debt, in case he neglect or refuse on demand to produce and deliver the goods and effects of the defendant found in his hands. Ibid, Sect. 60, P. L., 583.

(*d*) For form of judgment, on answers by the garnishee admitting the possession of assets, see Davidson v. Mullally, 3 Lack. Jurist, 181. Zurflieh v. Sossong, Ibid, 7. There must be a clear admission by the garnishee of the possession of assets to authorize judgment on the answers. Bank v. Meyer, 59 Pa., 361. McCallum v. Lockhart, 179 Pa., 427. Hagy v. Hardin, 186 Pa., 428. If the answers are insufficient or evasive, the practice is to file exceptions and ask for more specific answers. McCallum v. Lockhart, 179 Pa., 427. The plaintiff would not seem to be entitled to move for judgment because of their insufficiency. Ibid. Lauback v. Black, 1 W. N. C., 314. But see Henwood v. Legion of Honor, 2 Dist. (Pa.), 170. Where the garnishee admits owing the money attached, but states that it is claimed by others than the defendant, he may be relieved from liability by paying it into Court, to be disposed of on an issue between the parties. Good v. Grant, 76 Pa., 52. Fish v. Keeney, 91 Pa., 138. Where the garnishees are executors or administrators a judgment de propriis should not be entered in the first instance. Lorenz v. King, 38 Pa., 93. Mauer v. Kerper, 102 Pa., 444.

Unless the plaintiff recovers more than is admitted to be due by the answers, he must pay the costs. Newlin v. Scott, 26 Pa., 102. Irwin v. R. R., 43 Pa., 488. Where money or other property is attached in the hands of executors or administrators, the garnishee, after the third term, may obtain a rule on the parties to proceed with the attachment within such time as the Court may direct, or in default, the Court may discharge the garnishee from liability therefor. Act Feb. 28, 1873, P. L., 37. Aside from this, an attachment execution binds not only the property in the hands of the garnishee at the time, but whatever comes into them afterwards. Franklin Fire Ins. Co. v. West, 8 W. & S., 350. Sheetz v. Hobensack, 20 Pa., 412. Mahon v. Kunkle, 50 Pa., 216. Hays v. Lycoming Ins. Co., 99 Pa., 621. Although possibly not, after a plea. Mullen v. Maguire, 1 W. N. C., 577. Excelsior Brick Co. v. Gibson, 21 W. N. C., 32. But see Silverwood v. Bellas, 8 Watts., 420. Raiguel v. McConnell, 25 Pa., 362. Benners v. Buckingham, 5 Phila., 68. German Sav. Bank v. Braddock Mill Co., 44 Pitts. Leg. Journ., 193.

Rule 28. In an attachment against a fraudulent debtor (*a*), on exceptions filed for defects apparent on the record (*b*), or on a denial under oath of the charges made in the plaintiff's affidavit (*c*), the defendant shall be entitled as of course to a rule to dissolve (*d*), to be heard as to the facts, upon depositions duly taken (*e*). In other respects, the proceedings shall be the same as in the case of an attachment execution (*f*).

(*a*) A debt not due is not sufficient to sustain a fradulent attachment. Jones v. Brown, 167 Pa., 395. Alexander v. Driesen, 4 Lack. Leg. News, 41. But it is not necessary that this should be true of the whole debt sued on. Lewis v. Lehman, 2 Lack, Leg. News, 101. And where the plaintiff has included more than he can maintain, it may be eliminated by amendment, provided the substance of the claim is not disturbed. Solomon v. Driesen, 2 Lack. Leg. News, 361.

(*b*) Exception may be taken that the affidavit is insufficient. Biddle v. Black, 99 Pa., 380. But an affidavit in the words of the Act is sufficient in the first instance. Sharpless v. Ziegler, 92 Pa., 467. And much more is it, where there are specific charges of fraud. Werner v. Zierfuss, 162 Pa., 360. Werner v. Gross, 174 Pa., 622.

(*c*) Where the defendant has denied, under oath, the charges made in the affidavit, the burden is on the plaintiff to sustain them by evidence. Holland v. Atzerodt, 1 Walk., 237. Bailey v. Parker, 2 Lack. Jurist, 73. Matthews v. Dalsheimer, 10 W. N. C., 371. Morris v. Hineman, 9 Kulp., 498.

(*d*) A motion to dissolve is too late after any step has been taken which recognizes the validity of the proceedings. 4 Cyc., 784. Loewenstein v. Sheetz, 7 Phila., 361. Raub v. Morton, 2 Law Times (N. S.), 9. But not, after a bond by the defendant for the forthcoming of the property, authorized by the statute, the property being still in legal custody, and the defendant having thus an interest to contest the regularity of the proceedings. 4 Cyc., 687. Maitland Driving Park v. Fisk, 2 Lack. Leg. News, 210. Dienelt v. Aronica Fabric Co., 2 Pa. Co. Ct., 206. Fernau v. Butcher, 113 Pa., 292. Even after an assignment for the benefit of creditors, the defendant has a contingent interest which entitles him to move to dissolve. Holland v. Atzerodt, 1 Walk., 237.

(*e*) The action of the Court on the motion to dissolve is not reviewable, except for irregularities appearing on the record. Wetherald v. Shupe, 109 Pa., 389. Hoppes v. Houtz, 133 Pa., 34. Hall v. Oyster, 168 Pa., 399. Moss v. Mitchell, 174 Pa., 517. Lafferty v. Corcoran, 175 Pa., 5. Slingluff v. Sisler, 193 Pa., 264.

(*f*) After a motion to dissolve has been refused, the question of fraud is not open, and the only issue at the trial is as to the validity of the plaintiff's claim. Walls v. Campbell, 125 Pa., 346. Slingluff v. Sisler, 196 Pa., 121.

ATTORNEYS (*a*).

Rule 29. Any person of good moral and professional character shall be entitled to admission (*b*) as an attorney and counsellor of this court; who shall have been previously admitted to the Supreme Court of the United States; or to the Court of Appeals of this or any other circuit; or, if a resident of Pennsylvania, to the Supreme Court or the Superior Court of that state; or, if not such resident, to the court of last resort of the state or territory where he does reside. He shall subscribe to the roll and take the following oath (*c*):

"I do swear (or affirm) that I will demean myself as an attorney and counsellor of this court (*d*) uprightly (*e*), and according to law, and that I will support the Constitution of the United States."

Attorneys and counsellors of other courts, who do not possess the full qualifications required by the foregoing rule, may be admitted specially, for the purposes of a particular case, at the discretion of the court.

[East. Dist. (Pa.), Rule 3, Sect. 1. West. Dist. Rule 7, Sect. 1.]

(*a*) The Federal Courts are authorized by statute to regulate by rule who shall be permitted to manage and conduct cases therein. Rev. Stat., Sect. 747; except that parties may manage their own cases if they so desire. Ibid; and clerks and marshals, with their assistants and deputies are prohibited from acting as to matters in their own district. Rev. Stat., Sect. 748. Women are also eligible. Act Feb. 15, 1879. 20 Stat., 292.

(*b*) The admission of an attorney is a judicial act, as to which the legislature may prescribe qualifications, but cannot otherwise control. Ex parte Secombe, 19 How., 9. Ex parte Garland, 4 Wall., 378. Brackenridge's Case, 1 S. & R., 187. Splane's petition, 123 Pa., 527. In re Cooper, 22 N. Y., 67. Manning v. French, 149 Mass., 391. The fee to be paid to the Clerk for admission is $1.00. Act Congress June 29, 1902. 32 Stat., 476; which includes the certificate. 16 Comptroller's Dec., 372.

(*c*) The form of oath is that prescribed by the rules of the U. S. Supreme Court. 1 Rose's Fed. Proc., Sect. 489. The English oath is, that the person admitted, "will truly and honestly demean himself in the practice of an attorney, according to the best of his knowledge and ability." 1 Tidd Prac., 70. The oath required by statute in Pennsylvania is as follows: "You do swear (or affirm) that you will support the constitution of the United States and of this Commonwealth; and that you will behave yourself in the office of attorney within this Court, according to the best of your learning and ability; and with all good fidelity as well to the Court, as to the client; that you will use no falsehood, nor delay any person's cause for lucre or malice." Act April 14, 1834, Sect. 69, P. L., 354. For oath recommended by Committee of American Bar Association, see 14 Pa. Bar

Assoc. Reports, p. 270. For provisions of Mass. oath, see 39 Amer. Law Review, p. 641.

(*d*) Attorneys are officers of the Court, but not officers of the United States. Ex parte Garland, 4 Wall., 333. Nat'l Savings Bank v. Ward, 100, U. S., 195.

(*e*) An attorney violates his oath when he consciously presses for an unjust judgment. Rush v. Cavenaugh, 2 Pa., 187.

Rule 30. Any attorney or counsellor admitted to practice in this court who is not a resident of the District or does not maintain an office therein for the regular transaction of business, shall, in each case or proceeding in which he appears, have associate counsel, resident of and maintaining an office in the District, whose appearance shall also be entered of record, upon whom all notices, rules, and pleadings may be served in accordance with the rules and practice of this court. And the attendance of such associate counsel upon any motion, hearing, or taking of testimony, shall be a sufficient appearance for the party or parties whom he so represents.

[East. Dist. (Pa.), Rule 3, Sect. 4. West. Dist., Rule 7, Sect. 3 and Rule 42.]

Where a non-resident attorney has appeared and acted, the appearance, nunc pro tunc, of a resident attorney may be allowed so as to comply with this rule. Byrne's Account, 17 Dist. (Pa.), 427.

Rule 31. An alphabetical roll shall be kept of the attorneys of the Court, in a book provided for the purpose, which shall be signed by each at the time he is admitted, and shall show his residence, the date of his admission, and upon whose motion it was allowed.

As to the antiquity of this practice, see 1 Tidd, 71. The admission of an attorney must be proved by the record, which is primarily the roll where his name is entered. Forster v. Cale, 1 Strange, 76. But it may also be shown by a book into which the names are copied alphabetically therefrom. Rix v. Crossley, 2 Esp., 526. Humphreys v. Harvey, 1 Bingh. N. C., 62. Hence, when an attorney is disbarred, the judgment is that he be stricken from the roll. Forster v. Cale, 1 Strange, 76. Humphreys v. Harvey, 1 Bingh. N. C., 62. Per Park, J. Where enrollment is required by statute before practicing, it cannot be entered nunc pro tunc. Ex parte Fellows, 3 Ill. (2 Scam), 369. Where an attorney for proper reasons has changed his name, the roll may be changed to correspond. In re James 5, Exch., 310. In re Dearden. Ibid, 740. Re Matthews, 16 Beav., 245.

Rule 32. Every attorney, appearing in a case, shall have his name entered of record therein, which appearance shall not be withdrawn, except by leave of court; and (unless otherwise provided by these rules) so long as it remains, any notice required to be given in the case may be served upon him with

the same effect as if served upon the party whom he represents.

[West. Dist. (Pa.), Rule 7, Sect. 1.]

An appearance by attorney once regularly entered cannot be withdrawn except by leave of Court, and so long as it remains, the opposite party has the right to treat the attorney as the authorized representative of the other on whom notice may be servd. U. S. v. Curry, 6 How., 106. Creighton v. Kerr, 20 Wall., 8. Leave to withdraw should not be given without notice. Daley v. Iselin, 212 Pa., 279.

If the attorney withdraws his appearance, although without leave, the case may be treated as though there were no appearance and judgment by default be enterd for want of it. Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S., 603. A party has an absolute right to change his attorney at any time; and where the case has been taken on a contingent fee of doubtful validity, the court as a condition to substitution will not compel the party to pay for services rendered. Silverman v. Penna. R. R., 141 Fed., 382.

Rule 33. Any attorney may be required (*a*) to file his warrant of attorney (*b*), as of course, at the term to which he declares or appears (*c*); or afterwards, for cause shown.

(*a*) The subject of this rule is largely covered by statute in Pennsylvania. Act April 14, 1834, Sect. 71. P. L., 354. But Courts have inherent authority to require an attorney to file his warrant under their supervisory powers. King of Spain v. Oliver, 4 Wash. C. C., 429. Commissioners v. Purdy, 36 Barb. (N. Y.), 266.

(*b*) The original warrant must be filed and not a copy. Commonwealth v. Peterson, 1 Clark, 482. Neither will affidavits or letters take its place. Fisler v. Reach, 202, Pa., 74. Day v. Adams, 63 N. C., 254. But it need not be under seal. Kinnersley v. Mussen, 5 Taunt., 264. Osborn v. U. S. Bank, 9 Wheaton, 738. Grubb v. Serrill, 1 Del. Co., 141. And where it is for the plaintiff it must proceed from the party in whom the right of action resides. Fisler v. Reach, 202 Pa., 74. Hess v. Hess, 1 W. N. C., 194. Mississippi R. R. v. Southern R. R., 8 Phila., 107. City v. Strawbridge, 4 W. N. C., 215. But in a suit by partners the warrant of a majority is sufficient. Clarke v. Slate Co., 136 Pa., 408. And the Auditor General is authorized to warrant for the state in a suit to collect a license fee. Commonwealth v. Dehner, 12 W. N. C., 223.

(*c*) A rule on an attorney to file his warrant is, in the first instance, an office rule. Dunn v. Stone, 11 W. N. C., 95. And is a matter of right if applied for in time. Mississippi R. R. v. Southern R. R., 8 Phila., 107. It is too late, however, after plea pleaded, except for cause shown. Mercier v. Mercier, 2 Dall., 142. Campbell v. Galbreath, 5 Watts., 423. Sheetz v. Whitaker, 7 W. N. C., 570. Rogers v. Crommelin, 1 Cranch, C. C., 536. Knowlton v. Plantation, 14 Me., 20. Beckley v. Newcomb, 24 N. H., 359.

Rule 34. All agreements of attorneys (*a*), not made in open court (*b*), shall be in writing, or otherwise they will not be enforced.

[East. Dist. (Pa.), Rule 2.]

(*a*) This is a salutary rule intended to prevent misunderstandings and unpleasantness. Powell v. Tobias, 2 Phila., 274. Reamer's App., 18 Pa., 510. It has prevailed from an early day in Pennsylvania. Shippen v. Bush, 1 Dall., 270. And exists very generally elsewhere. Combs v. Wyckoff, 1 Caines Rep. (N. Y.), 147. Parker v. Root, 7 Johnson, 320. Huff v. State, 29 Ga., 424. Palatka R. R. v. State, 23 Fla., 546. Smith v. Wadleigh, 17 Me., 353. Suydam v. Dequindre, Walk. Chan. (Mich.), 23. Roberts v. Partridge, 118 N. C., 355. Livesey v. Pier, 9 Wash., 658. Evans v. State, 19 Fed. (Louis.), 676. Lee v. Simpson, 42 Fed. (S. Car.), 434. In some states it is enforced by statute. Goben v. Goldsberry, 72 Ind., 44. State v. Stewart, 78 Iowa, 726. McCann v. McLennan, 3 Neb., 25. Merritt v. Wilcox, 52 Calf., 238. But it only applies to the ordinary routine of practice, and does not extend to an agreement with reference to a sheriff's sale. Reamers' App., 18 Pa., 510.

(*b*) Agreements in open Court stand on a different footing, and are sufficiently evidenced by being noted on the journal by the clerk. Lewis v. Wilson, 151 U. S., 551.

Rule 35. No attorney shall be accepted as bail or security of any kind, in any matter depending in, or which may come into Court (*a*) except by leave of Court (*b*) for cause shown.

[East. Dist. (Pa.), Rule 3, Sect. 3, and Rule 5, Sect. 2. West. Dist., Rule 9, Sect. 2.]

(*a*) This rule was adopted at an early day in the English Courts. 1 Tidd Prac., 247. Doug., 466, n. 1 H. Black, 76. And it prevails very generally in the United States. 4 Cyc., 919. Nor can there be any question as to the power of the Court to so provide. Ohio R. R. v. Hardy, 64 Ind., 455. It is intended, in part at least, for the benefit of attorneys, to protect them from the importunity of clients. 1 Tidd. Prac., 247. Although it is not confined to the case in which the attorney is professionally engaged. 1 Chitty, 714, n. Gilbank v. Stephenson, 30 Wis., 155. It is of importance in preventing unpleasant relations between the Court and its attorneys, over questions of financial responsibility, or because of having to enforce the security. The moral influence on the bar is also salutary. Abbott v. Zeigler, 9 Ind., 511. The contrary practice borders on champerty. 3 Amer. & Eng. Encycl. Law, 2nd Ed., 291. But in the absence of a rule there is nothing to prevent an attorney from becoming security. Abbott v. Zeigler, 9 Ind., 511. 3 Amer. & Eng., Encycl. Law, 2 Ed., 292. And while he cannot justify in the face of it, if he is taken and not excepted to, he is liable. 1 Chitty., 714, n. 4 Cyc., 919. 3 Amer. & Eng. Encyc. Law, 2 Ed., 292.

(*b*) The violation of the rule is a contempt. Wallace v. Scoles, 6 Ohio, 429. Ohio R. R. v. Hardy, 64 Ind., 455. But the proceedings will not, in the first instance, be dismissed, but the party will be allowed to remedy the defect. Branger v. Buttrick, 30 Wis., 153. Ohio R. R. v. Hardy, 64 Ind., 455. To prevent evasion, the rule is held to extend to persons indemnified by the attorney. Capon v. Dillamore, 1 Bingh., 423. Hunt v. Blaquire, 4 Bingh., 488. Anon, 1 Dowl. Prac. Cases, 1. But in some Courts this is covered by special rule. Greensill v. Hopley, 1 Bos., & Pul., 103. Chick's Bail, 1 Chitty, 714, n.

AUDITORS.

Rule 36. Where the proceeds of any marshal's or other execution or judicial sale are brought into court and referred to an auditor for distribution, public notice of the time and place of hearing shall be given by the auditor by advertisement for three successive weeks in two newspapers to be designated by the court, which are published in the county where the case originated, or the principal parties interested are found; in which notice all persons shall be required to make known their claims before the auditor or be debarred from coming in upon the fund. And a like notice shall be posted in the clerk's office at least ten days before the hearing. This rule shall also apply to the auditing of the accounts of trustees, receivers, or others acting in an official or fiduciary capacity.

[East. Dist. (Pa.), Rule 4, Sect. 2. West. Dist., Rule 8.]

Rule 37. In any case referred to an auditor, any person desiring an issue shall reduce his request to writing, stating the facts that are in dispute, which shall be verified by affidavit, and submit the same to the auditor within two days after the conclusion of the hearing. And it shall be the duty of the auditor to forthwith make report thereof to the court together with his opinion upon the propriety of granting the same.

[East. Dist. (Pa.), Rule 4, Sect. 3.]

Rule 38. Any person adversely affected by the report of an auditor may except thereto, and in order to afford opportunity therefor no auditor shall file his report until ten days after he has notified the parties who appeared before him, of his intention so to do, on a day designated, giving them access to his report, meanwhile; and unless justice requires it, no exception, not filed before the auditor, shall be considered by the court. Upon exceptions being filed, it shall be the duty of the auditor to re-examine the matters excepted to, and correct his report, if they are found in whole or in part to be well taken. The exceptions so filed shall be returned by the auditor, along with his report, which shall be confirmed nisi by the clerk when filed and if no exceptions be taken thereto within ten days it shall be confirmed finally. If no exceptions are returned by the auditor, the report shall be confirmed absolutely by the clerk, when filed.

[East. Dist. (Pa.), Rule 4, Sect. 1. West. Dist., Rule 8.]

BAIL.

Rule 39. No capias ad respondendum shall issue unless an affidavit of due cause of action, stating the facts, shall be first made and filed. Nor shall bail be demanded thereon, exceeding $1,000 unless specially allowed by one of the judges of the court.

[East. Dist. (Pa.), Rule 5, Sects. 1 and 6. West. Dist., Rule 9, Sect. 1.]

Rule 40. No attorney (*a*), marshal, marshal's officer, bailiff, or other person concerned in the execution of process, shall become bail or security thereon or in any matter depending in or to come before the court, except by leave of court for cause shown. And if bail is entered in disregard of this rule it may be stricken off upon motion.

[East. Dist. (Pa.), Rule 5, Sect 2. West. Dist., Rule 9, Sect. 2.]

(*a*) See also Rule 35, supra.

Rule 41. It shall be the duty of the marshal, upon taking bail to the action, to give notice in writing of the names and places of residence of such bail, to the plaintiff in the action, his agent or attorney, on or before the return day of the writ.

This is required of the sheriff, by statute, in Pennsylvania. Act June 13, 1836, Sect. 13. P. L., 574.

Rule 42. Bail taken by the marshal may be excepted to by the plaintiff, at any time within twenty days after the return day of the writ, of which due notice shall be given to the marshal. Exceptions to such bail must be made in writing and filed with the clerk, and notice given to the defendant to justify, which he shall be required to do, or substitute or add new bail, within ten days thereafter. In case of the justification, addition, or substitution of bail, the plaintiff shall be entitled to five days' notice in writing of the time and place of doing so, which notice, in case of additional or new bail, shall state the residence and occupation of such bail and the property owned by him.

[East. Dist. (Pa.), Rule 5, Sects. 3 and 4. West. Dist., Rule 9, Sects. 4 and 5.]

The Courts of Pennsylvania are authorized by statute to make "such rules respecting the time and manner of giving notice of bail, excepting to bail, and justifying bail * * * as the convenient administration of justice in such Court may require." Act June 13, 1836, Sect. 15.

P. L., 574. Where bail is excepted to, and is not justified, the proper course is to rule the marshal to bring in the body, and compel the defendant to put in good bail or pay into Court the sum demanded. Fitler v. Bryson, 6 W. & S., 566. And the Court will enforce obedience to the rule by attachment. White v. Fitler, 7 Pa., 533. The right to except may be waived by acts which manifest such an intention. Murtland v. Wright, 7 W. N. C., 388. As where exceptions are taken but not persisted in. Fitler v. Bryson, 6 W. & S., 566. Cummings v. Meeker, 2 M., 83. White v. Fitler, 7 Pa., 533. But this does not discharge the bail. Commonwealth v. Heilman, 4 Pa., 455.

Rule 43. A rule to show cause of action, and why the defendant should not be discharged on common bail, is of course, but must be taken within ten days after the return day of the writ (*a*).

[East. Dist. (Pa.) Rule 5, Sect. 5. West. Dist. Rule 9, Sect. 6.]

(*a*) For practice, see Logan v. O'Neill, 34 W. N. C., 281.

BILLS OF EXCEPTIONS (*a*).

Rule 44. Bills of exceptions shall be settled and filed at the term at which the case is tried, or at a time beyond it to which by order of court the settlement of the same is enlarged (*b*). Or where a rule for a new trial is pending, they may be settled at any time before it is discharged (*c*).

[East. Dist. (Pa.), Rule 10, Sect. 3. West. Dist., Rule 10, Sect. 2.]

(*a*) For form of a bill of exceptions, see 1 Loveland Fed. Forms, Nos. 138 & 139. As to what such bills shall contain, see C. C. A. Rules, Third Circuit, Rule 10, Sects. 1 & 2. See also Atlantic Coastline v. Linstedt, 184 Fed., 36. The authentication of such bills is regulated by Rev. Stat., Sect. 953, as amended by Act June 5, 1900, 31 Stat., 270. A bill must be disregarded which is not signed by the trial judge. Knight v. Illinois Central R. R., 180 Fed., 368.

(*b*) The general rule with regard to the allowance of bills of exceptions is thus stated by Mr. Justice Gray, Bank v. Eldred, 143 U. S., 293: "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this Court unless they were taken at the trial, and are also embodied in a formal bill of exceptions, presented to the Judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and save under very extraordinary circumstances, they must be allowed by the Judge and filed with the clerk during the same term. After the term has expired without the Court's control over the case being reserved by standing rule, or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed is at an end."

Bills of exceptions cannot be allowed nunc pro tunc after the term has expired unless control of the case has been reserved by rule or order. Jones v. Grover, & Baker Sewing Machine Co., 131 U. S. cl. Michigan Ins. Bank v. Eldred, 143 U. S., 293. Reader v. Haggin, 160 Fed., 909. Wyss v. Maryland Casualty Co., 193 Fed., 53. And an exception to the action of the court, allowing judgment for the defendant non obstante veredicto, is too late after the next term has begun. McCord v. Balt. & Ohio R. R., 187 Fed., 743. But there may be exceptional circumstances, under which a bill of exceptions can be signed after the expiration of the term; as where the exhibits were mislaid and unable to be found before. Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., 151 Fed., 466; or the stenographer is unable to transcribe his notes in time. Dalton v. Gunnison, 165 Fed., 873; or the trial judge by reason of illness is unable to sign the bill. Roberts v. Bennett, 135 Fed., 748. The consent of the opposite party to the settlement of a bill after the term will not be implied, where he simply attends on notice and remains silent. Jennings v. Phila. Balt. & Wash. R. R., 218 U. S., 255. A standing rule does not prevent the court from granting additional time for filing a bill. U. S. v. Waite, 193 Fed., 258. And the Court, even after the term, may correct the mistakes or misprisions of the clerk. In re Wight, 134 U. S., 136. Ommen v. Talcott, 180 Fed., 925. And see Metropolitan Trust Co., 218 U. S., 312. The court, by an order made at the trial term, may continue the settling of a bill to a time beyond. Minahan v. Grand Trunk R. R., 138 Fed., 37. Where a bill of exceptions was duly settled and certified, but was not filed in time nor served as required by the rules, it will be assumed on appeal that the court relaxed its rules for good cause shown. Seattle v. Board of Home Missions, 138 Fed., 307.

(*c*) A bill of exceptions may be settled and filed at the term at which a rule for a new trial is discharged. Merchants Ins. Co. v. Buckner, 98 Fed., 222. Kentucky Distilleries Co. v. Lillard, 160 Fed., 34.

Rule 45. No bills of exceptions to the admission or rejection of evidence shall be allowed unless objection was made and noted at the time (*a*). Exceptions to the charge of the court and the answers to points must specify the particular part of the charge or the particular answer objected to, and a general exception will not be allowed (*b*). They may be taken after the jury have retired, but must be taken before they have returned with their verdict (*c*).

[East. Dist. (Pa.), Rule 10, Sects. 2 and 3. West. Dist., Rule 10, Sect. 1.]

(*a*) The ground of objections must be stated. A recital in the record with regard to the answer to a question, "excepted to, admitted, objection noted," is not sufficient. Atlantic Coast Line v. Linstedt, 184 Fed., 36; and an exception to the charge, "so far as the instructions are inconsistent with requests for rulings," is bad. Partridge v. Bost. & Maine R. R., 184 Fed., 211. The ground of the exception must be specified in order that the court shall have its attention directed to the error alleged to have been committed and be able to correct it. Merchants' Ins. Co. v. Buckner, 110 Fed., 345. Aetna Indemnity Co. v. Farmers Nat. Bank, 169 Fed., 737.

(*b*) A general exception to the charge is prohibited by the Rules of the Supreme Court (Rule 4), as well as by those of the Court of Appeals of this circuit (Rule 10).

(*c*) Since this rule was adopted, the Court of Appeals of this circuit has promulgated a rule which requires that exceptions shall be taken before the jury have retired. C. C. A., Rule 10, Sect. 1. Star Co. v. Madden, 188 Fed., 910. This is not a mere formal or technical provision, but is in the interest of justice in order that there may be opportunity for correction if the court is advised of the need of it in time. Phelps v. Mayer, 15 How., 160. The fact that exception was taken to the charge before the jury had retired must appear in the record. Sheppard v. Wilson, 6 How., 260. Mann v. Dempster, 179 Fed., 837. Star v. Madden, 188 Fed., 910. A rule of court which permits of exceptions to the charge after the jury have retired, but before they have returned will not be regarded to apply generally, but only where it is in the interest of justice, in order to avoid confusing the jury, or where instructions have been given in the absence of counsel. Montana Mining Co. v. St. Louis Mining & Milling Co., 147 Fed., 897. But where the court directed the jury to retire before the party had an opportunity to except, this may itself be made the ground of an exception, which will call for a reversal. Western Union Tel. Co. v. Baker, 85 Fed., 690. Berwind-White Coal Co. v. Firment, 170 Fed., 151. Mann v. Dempster, 179 Fed., 837. In the absence of a rule it would seem to be enough that exceptions to the refusal of the court to a party's requests were noted at the trial in open court, although after the jury had retired. Gandia v. Pettingill, 222 U. S., 452, 459.

Rule 46. Bills of exceptions shall state the issues tried, and the evidence given on either side to sustain them (eliminating all irrelevant matters) together with the charge of the court, or so much thereof as is material to a proper understanding of the case. Copies of proposed bills shall be submitted to opposing counsel not less than five days before they are presented to the court for allowance.

[East. Dist. (Pa.), Rule 10, Sect. 3.]

See 1 Loveland Fed. Forms, Nos. 138 & 139 for forms of such bills.

Bills of exceptions will be assumed to contain all the relevant testimony, whether so stated or not. Clyatt v. U. S., 167 U. S., 207.

COMMISSIONERS.

Rule 46 a. United States Commissioners of this District shall mail or send to the office of the Marshal at Scranton, all process issued by them for the arrest or apprehension of alleged criminal offenders, in order that such process may be noted on the Marshal's docket before being executed; provided, that, in any case, where the delay caused by mailing or sending such process to the Marshal's office would materially increase the expense of the proceeding, or permit the defendant to escape, or where for other good reason it is im-

portant that the writ shall be served without this delay, the Commissioner issuing the writ may hand the same to the Marshal or one of his Deputies, but in no instance to any other person, and shall further enter at large upon his docket the necessity for this action, and state the same briefly in his accounts.

Rule 46 b. Immediately upon the termination of any case pending before a United States Commissioner of the district, he shall transmit to the clerk a complete transcript of the proceedings had, together with the original warrant, information, subpoena, recognizance or commitment, and all other papers.

CONDEMNATION PROCEEDINGS.

Rule 47. In all cases, where property is sought to be condemned by the government (*a*) in pursuance of authority for that purpose given by law (*b*); or has been taken, injured, or destroyed, by any municipal or other corporation under the power of eminent domain (*c*), or as the result of a municipal improvement (*d*); application for the appointment of viewers to assess the damages shall be by petition which shall set forth the property taken or affected, together with a map or plot of the same, the names of the owner or owners thereof, and such other facts as are necessary to give jurisdiction. And ten days' notice in writing of the intended application shall be given to the opposite party or others interested, which shall be served in the manner provided for the service of a summons. The practice, pleading, forms, and modes of procedure, in other respects, shall conform to those existing at the time in like cases in the state courts (*e*).

(*a*) For form of petition, see 1 Loveland Fed. Forms, Nos. 152, 153 & 154.

(*b*) Proceedings for the condemnation of land for the improvement of rivers and harbors are regulated by Act of Congress, of April 24, 1888. 25 Stat., 94. And those for the condemnation of sites for public buildings and other public uses, by Act of August 1, 1888. 25 Stat., 357; jurisdiction being vested by the latter in the District Court of the district where the lands lie. And this is extended to proceedings to condemn land by the Gettysburg Battlefield Commission, by Act. Feb. 11, 1895, 28 Stat., 651; the validity of which has been sustained. United States v. Gettysburg R. R., 160 U. S., 668. But costs cannot be taxed in such cases against the United States. Carlisle v. Cooper, 64 Fed., 472.

(*c*) A proceeding to condemn, under the state law, is an action at law, within the meaning of the judiciary Act of 1789, of which the

Courts of the United States have jurisdiction under the general grant of authority thereby conferred. Kohl v. United States, 91 U. S., 367. In re Rugheimer, 36 Fed., 374. Proceedings of that character, begun in the state Courts may therefore be removed into the Federal Courts under the removal statutes. Boom Co. v. Patterson, 98 U. S., 403. Pacific R. R. Removal cases, 115 U. S., 3. Searl v. School Dist., 124 U. S., 197. Martin v. Balt. & Ohio R. R, 150 U S, 673. Mineral R. R. v. Lake Copper Co., 25 Fed., 520. Kansas City R. R. v. Interstate Lumber Co., 37 Fed., 4. Sugar Creek R. R. v. McKell, 75 Fed., 35. Postal Tel. Co. v. Southern R. R., 88 Fed., 804. Union Terminal R. R. v. Chic. B. & Q. R. R., 119 Fed., 209. South Dakota Cent. R. R. v. Chic. M. & St. P. R. R., 141 Fed., 578. Helena Power Co. v. Spratt, 146 Fed., 310. Kansas City v. Hennegan, 152 Fed., 249. So may an assessment proceeding for a municipal improvement. In re City of Chicago, 64 Fed., 898; or an appeal from the decision of the state engineer with regard to a permit to appropriate water. Waha-Lewiston Co. v. Lewiston-Sweetwater Irrigation Co., 158 Fed., 137. Nor can the state defeat the right to remove by changing the form of the action. Wilson v. Smith, 66 Fed., 81.

(*d*) A Federal Court also has jurisdiction to appoint viewers in an original proceeding on the petition of a citizen of another state, whose property has been taken for a municipal improvement. In re Delafield, 109 Fed., 577.

But a petition to railroad commissioners for leave to condemn is not removable. New York &c., v. Crockcroft, 46 Fed., 881. Nor proceedings to determine the right to condemnation. Hartford & C. W. R. Co. v. Montague, 94 Fed., 227. Nor an appeal from an assessment of taxes, where the Court with respect to such proceedings is not a judicial body, but acts merely as a board of commissioners. Upshur Co. v. Rich, 135 U. S., 467. But it would seem to be otherwise where the appeal proceeds according to judicial methods. Ibid.

(*e*) Conformity to the state practice is prescribed by Act of August 1, 1888, Sect. 2. 25 Stat., 327. Broadmoor Land Co. v. Curr, 142 Fed., 421. In re Rugheimer, 36 Fed., 369. Carlisle v. Cooper, 64 Fed., 472. In re Secretary of Treasury, 45 Fed., 396, Chappell v. United States, 81 Fed., 764, 160 U. S., 499. United States v. Engeman, 45 Fed., 546. As to the proper practice under the state law, see Emery v. Pa. Monongahela & Southern R. R., 15 Dist. (Pa.), 149. The mere fact, that by the state practice the land owner is described as the plaintiff, does not prevent a removal by him as the practical defendant in the case. Mason City &c. R. R. v. Boynton, 204 U. S., 570.

COSTS (*a*).

Rule 48. Where the plaintiff in any action at law or suit in equity is not a resident of the district (*b*), or, being so at the time of suit brought, afterwards removes therefrom; and in any case in which the defendant, his agent or attorney, shall make oath that the costs, as he verily believes, stating his reasons, could not be recovered of the plaintiff on execution; the defendant, upon filing an affidavit that he has a just defence against the whole of the plaintiff's demand, may have a rule on the plaintiff to give security for costs within a time

designated (*c*), and, in the meantime, proceedings shall be stayed; and, on failure to give such security, a judgment of non pros may be entered on motion.

[East. Dist. (Pa.), Rule 9, Sect. 1. West. Dist., Rule 11, Sect. 6.]

(*a*) By Revised Statute, Section 968, the plaintiff in an action at law originally brought in the District Court or a petitioner in equity who recovers less than $500 exclusive of costs in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds that amount "shall not be allowed, but at the discretion of the court may be adjudged to pay, costs." This provision is not affected by the fact that the jurisdictional limit of the court has been raised since this enactment. Eastman v. Sherry, 37 Fed., 844. Johnson v. Watkins, 40 Fed., 187. It does not apply, however, where a statute expressly provides that a plaintiff shall have full costs regardless of the amount recovered. Merchant v. Lewis, 1 Bond, 172; nor does it apply to cases of removal from a state court, such cases not being "originally brought" in the District Court within the terms of the law. Field v. Schell, 4 Blatchf., 435. Kreager v. Judd, 5 Fed., 27. Costs are also recoverable in an action against joint defendants where the total sum recovered exceeds $500, although the amount collectible against each defendant may be less. Johnson v. Mississippi &c. R. R., 31 Fed., 551. Neither are costs to be denied upon an action by a receiver of a national bank to recover assets. Murray v. Chambers, 151 Fed., 142. Nor is a plaintiff who recovers less than $500. to be penalized for costs unless it appears to the satisfaction of the court that the damages claimed were colorable. McCarthy v. American Thread Co., 143 Fed., 678.

But where nominal damages only are recovered, the statute prohibits the allowance of an attorney fee given in a suit under the interstate commerce law. Del., Lack. & Western R. R. v. Lyne, 193 Fed., 984.

(*b*) Security for costs may be required of a non-resident plaintiff where this is in accordance with the state practice. Schofield v. Palmer, 134 Fed., 753. Handy Varnish Co. v. Midland Linseed Oil Co., 191 Fed., 256; or a rule of court. Osborne v. Pennsylvania R. R., 159 Fed., 301. 20 Amer. Bank. Rep., 277. Winkley v. Bowen Mfg. Co., 180 Fed., 624. Karns v. Imlay, 181 Fed., 751. But see this doubted in Woods v. Bailey, 111 Fed., 121.

A non-resident plaintiff may be required to give security for costs even where a resident plaintiff is joined. Electric Vehicle Co. v. Gallagher, 145 Fed., 394. A trustee in bankruptcy, if a non-resident, comes within the rule. Osborne v. Pennsylvania R. R., 20 Amer. Bank. Rep., 277; 159 Fed., 301. Parties who sign supersedaes cost or delivery bonds voluntarily connect themselves with the suit in such a manner as to subject themselves to the jurisdiction of the court, in which the suit is pending and to a summary judgment upon their undertaking, when the amount of their liability can be ascertained without an issue and trial. Egan v. Chic. & Great West. R. R., 163 Fed., 344.

(*c*) By proceeding with the case without requiring security, the right to it is waived. Winkley Co. v. Bowen Mfg. Co., 180 Fed., 624.

Rule 49. Bills of costs duly verified by affidavit shall be taxed by the clerk as filed, subject to a re-taxation by the same, upon exceptions taken, on five days' notice to the opposite party or his attorney. Such exceptions shall specify the items objected to, with the reasons therefor, and be sustained by affidavit; and the party filing the bill shall thereupon be required to maintain the same by evidence or otherwise, to which the excepting party shall be entitled to reply in like manner. The clerk shall keep a record of the proceedings before him on the re-taxation; and from his final action therein an appeal may be taken to the court, to be entered within ten days after notice of his decision. In case the party excepting neglects to move for a re-taxation, the party filing the bill, upon five days' notice, may have the exceptions brought to a hearing or dismissed, as he prefers. No exceptions or appeal shall operate to stay the payment or collection of the costs, but the items excepted to, if paid, shall be retained by the clerk until the exceptions or appeal have been finally disposed of.

[East. Dist (Pa.), Rule 9, Sects. 2, 3 and 4.]

Rule 50. The clerk shall not be required to enter any suit, file any paper, or issue any process, nor shall the marshal be required to serve the same or perform any service, unless the fees therefor shall be first paid by the party requesting the same.

[West. Dist (Pa.), Rule 11, Sect. 5.]

A clerk is entitled to his fees in advance. Ommen v. Talcott, 180 Fed., 925. Hoysradt v. D. L. & W. R. R., 182 Fed., 880.

Rule 51. In all cases prosecuted to final judgment, or settled by the parties, in which the costs have not been paid or provided for, the clerk or marshal, to whom they are due, shall be entitled to a rule on the party against whom such judgment is entered, or in favor of whom such settlement was made, to pay his costs, in default of which, execution may issue in the name of such clerk or marshal, therefor (*a*). And where no steps have been taken in a case, by either party, for two years or more, on application of the clerk or other officer of the court, to whom costs are due, the court may order the same to be taxed, and require the plaintiff to pay them, and in default thereof may enter judgment of non-pros.

[East. Dist. (Pa.), Rule 9, Sects. 5, 6 and 7. West. Dist., Rule 11, Sects. 2 and 3.]

(*a*) An execution may issue in favor of the clerk or marshal in the name of the successful party for the costs due. Ranck v. Hill, 3 Pa., 423. Ellsbre v. Ellsbre, 28 Pa., 172. Howard Build. Assoc. v. Phila. & Read. R. R., 102 Pa., 220. Hoysradt v. D. L. & W. R. R., 182 Fed., 880.

Rule 52. Where a case is prosecuted *in forma pauperis,* in accordance with the statute, the foregoing rules, with regard to giving security for, or requiring the payment of costs, shall not be enforced.

See Act of Congress July 20, 1892, 27 Stat., 252. Woods v. Bailey, 111 Fed., 121. 113 Fed., 390.

For form of affidavit in such cases, see 1 Loveland Fed. Forms, p. 79. In some districts a certificate of counsel is further required. Ibid, p. 80.

But neither an appeal nor a writ of error can be prosecuted *in forma pauperis.* Galloway v. Fort Worth Bank, 186 Fed., 177. Bradford v. Southern Ry., 195 Fed., 243.

If the defendant disputes the affidavit he may move to dismiss. Woods v. Bailey, 113 Fed., 390.

The plaintiff is not precluded from suing *in forma pauperis* by reason of non-residence. Willis v. Willis, 20 Dist. (Pa.), 720.

Where the suit is prosecuted by plaintiff's attorney for a contingent fee, it must be shown that the attorney as well as his client is unable by reason of poverty to give the required security. Phillips v. Louisville & Nashville R. R., 153 Fed., 795.

DEPOSITIONS.

Rule 53. A rule to take the depositions of witnesses ex parte, to be read upon the hearing of a motion, petition, or rule to show cause (*a*), shall be of course, on five days' notice (*b*) to the opposite party or his attorney, of the names of the witnesses to be examined, and the time and place of taking the same, if it is to be executed within the circuit, or ten days, if outside of it. The testimony may be taken before a commissioner specially appointed by the court for the purpose, or before any person competent to administer an oath under the federal or the state law. The witnesses shall be examined orally, in the presence of the parties and their counsel, as nearly as may be in the manner that they would be in court; and their depositions shall be reduced to writing in the form of question and answer, and be read over to them and signed; or, by agreement of counsel they may be taken in narrative form; and by like agreement the reading and signing may be dispensed with. Depositions taken by the moving party shall be filed at least ten days before the hearing, and counter depositions, taken by the opposite party, at least one

day before the same, or otherwise they will not be considered by the court (*c*).

[East. Dist (Pa.), Rule 8, Sect. 4.]

(*a*) See also Rule 22, supra.

(*b*) For form of notice, see 1 Loveland Fed. Forms, 181.

(*c*) The taking of depositions de bene esse under Rev. Stat., Sects. 863, 865, is another matter. When depositions are taken by rule of court, these sections do not apply. Banert v. Day, 3 Wash. C. C., 243.

Rule 54. Depositions de bene esse (*a*), to be used on the trial of a cause, of aged, infirm, or way-going witnesses, or those who reside more than one hundred miles from the place of trial (*b*), or of one who is the only witness to a material fact, shall be of course, and shall be taken and returned in the manner provided by law.

[East. Dist. (Pa.), Rule 8, Sect. 1. West. Dist., Rules 37 to 40, inclusive.]

(*a*) The authority to take depositions is to be strictly construed, and the requirements of the law must be complied with. Bell v. Morrison, 1 Pet., 351. Potapsco Ins. Co. v. Southgate, 5 Pet., 604. Harris v. Wall, 7 How., 693. Walsh v. Rogers, 13 How., 283. The taking of depositions de bene esse was originally regulated by Rev. Stat., Sects., 863, 864 & 865. But by Act March 9, 1892, 27 Stat., 7, they may now also be taken in the mode prescribed by the state law. This act, however, only applies to the mode of taking them. It does not enlarge the instances when this character of proof can be resorted to. Nat'l Cash-Reg. Co. v. Leland, 77 Fed., 242, S. C. 94 Fed., 502. Texas & Pacific R. R. v. Wilder, 92 Fed., 953. Shellabarger v. Oliver, 64 Fed., 306. Tabor v. Indianapolis Journal, 66 Fed., 423. Seeley v. Kansas City Star, 71 Fed., 554. Despeaux v. Pennsylvania R. R., 81 Fed., 897. Zych v. Amer. Car Co., 127 Fed., 723. It simply provides for the taking of such depositions as are authorized by the Federal law, either according to the State or to the Federal practice. United States v. Fifty Boxes, 92 Fed., 601. Hanks Dental Assoc. v. Tooth Crown Co., 194 U. S., 303. It will not support therefore an order for the examination of a party before trial however authorized by the state law. Hanks Dental Assoc. v. Tooth Crown Co., 194 U. S., 303. Ex parte Fisk, 113 U. S., 713. United States v. Fifty Boxes, 92 Fed., 601. Smith v. Internat'l Mercantile Co., 154 Fed., 786. Nor can a witness be called as for cross examination under a state statute allowing it, or at least not in equity or admiralty. Dravo v. Fabel, 132 U. S., 487. Jacobs v. Van Sickle, 127 Fed., 62. But see Davidson Co. v. United States, 142 Fed., 315. Mississippi Glass Co. v. Franzen, 143 Fed., 501. Nor can a party be compelled to produce books and papers before the trial. Carpenter v. Winn, 221 U. S., 533. For the same reason the testimony of a witness taken at a former trial cannot be read from the stenographer's notes of it, even though authorized by the state law. Salt Lake City v. Smith, 104 Fed., 457. Diamond Coal & Coke Co. v. Allen, 137 Fed., 705. A rule of court providing that the depositions of witnesses may be taken without regard to whether they are aged, way-going or infirm, is not justified by the Pennsylvania practice. Internat'l Coal Mining Co. v. Pennsylvania R. R., 214

Pa., 469. And even where the state practice allows an open commission to take the testimony of unnamed witnesses to be examined orally, it will only be granted by the Federal Courts under the most exceptional circumstances, if at all. Wallace v. Appleton, 161 Fed., 884. Nor can the testimony of foreign witnesses be taken de bene esse, but must be taken on a commission or dedimus potestatem. Compania Azucarera Cubana v. Ingraham, 180 Fed., 516.

Depositions de bene esse, in equity, are to be taken as provided by Equity Rule 67.

The provisions of Rev. Stat., Sects. 863, et seq., do not apply to depositions taken under a rule of Court. Banert v. Day, 3 Wash. C. C., 243; nor to those taken in a foreign country. Bird v. Halsey, 87 Fed., 671.

For mode of taking depositions for use at the trial under the state law, see Act (Pa.), June 25, 1895. P. L., 279.

Forms appropriate to the present rule may be found in 1 Loveland Fed. Forms, Nos. 181 to 184 inclusive.

As to the authentication of exhibits offered in the course of taking depositions, see Rule 7, supra.

Even as to depositions taken abroad, the examination may be oral. Bischoffscheim v. Beltzer, 10 Fed., 4. Cortes v. Tannhauser, 18 Fed., 667.

A subpoena duces tecum on the taking of depositions de bene esse is not of course, but must be moved for. Dancel v. Goodyear Shoe Co., 128 Fed., 753. *Contra.* Henning v. Boyle, 112 Fed., 397. *Cf.* Crocker Co. v. Bullock, 134 Fed., 241. Even though such subpoena be too broad, the witness is in contempt if he refuses to answer any question or produce any papers or books. Hale v. Henkel, 201 U. S., 43.

(*b*) A party who resides out of the district and more than 100 miles from the place of trial, may be compelled to appear and testify by depositions de bene esse, which may be taken wherever he can be found. Hartman v. Feenaughty, 139 Fed., 887. Blood v. Morrin, 140 Fed., 918.

But this is not true of depositions taken on commission which must be executed in the district where the witness resides, unless his attendance is voluntary. Tomlinson v. Moore, 189 Fed., 845.

Rule 55. A dedimus potestatem or commission to take depositions according to common usage (*a*), or Letters Rogatory (*b*) to a foreign country, may be had on motion, supported by affidavit, on five days' notice to the opposite party or his attorney, for cause shown. Interrogatories to accompany the same shall be filed by the moving party at least fifteen days before such commission or Letters Rogatory are to issue, copies of which shall be forthwith served on the opposite party or his attorney, who shall be entitled to file cross interrogatories thereto within ten days thereafter, copies of which shall be similarly served; or in case of a commission, the depositions may be taken orally, in the presence of the parties and their counsel, upon such terms and conditions as to time, place, notice, and manner of taking the same, as the

court in its order may direct. Upon the return of such commission or Letters Rogatory, notice thereof shall be forthwith given to the respective parties by the clerk by mail, and either party within ten days thereafter may except in writing to the manner of executing the same, in default of which no objections to the admissibility of the depositions will be entertained except such as go to the materiality or competency of the evidence or the right of the party to this mode of proof.

[East. Dist. (Pa.), Rule 8, Sects, 2 and 5, and Rule 14. West. Dist., Rules 32 to 40, inclusive. Rev. Stat., Sect. 866.]

(*a*) COMMISSION OR DEDIMUS POTESTATEM. For order for a dedimus potestatem, see 1 Loveland Fed. Forms, Nos. 187, 188 and 189. As to the manner of taking depositions under a commission, see Rev. Stat. Sects. 868 to 870 inclusive; also Giles v. Paxton, 36 Fed., 882. Depositions taken under a dedimus potestatem are not to be confused with those taken de bene esse. Sargeant v. Biddle, 4 Wheat., 508. The expression "according to common usage," means according to the practice under the state law; Buddicum v. Kirk, 3 Cranch, 293; recourse to which is directly sanctioned by Act March 9, 1892, 27 Stat., 7. The subject is regulated, in Pennsylvania, by Act June 25, 1895. P. L., 279. In equity, the equity practice is to be followed. Bischoffscheim v. Baltzer, 10 Fed., 1. And such depositions may be taken when necessary, even though not allowed by the state law. Jones v. Oregon Central Railroad, 3 Sawy., 523.

A commission is not of course, but is granted only for cause shown. United States v. Parrott, McCall's Rep., 447. Sutton v. Mandeville, 1 Cranch., C. C., 115. Magone v. Col. Smelting Co., 135 Fed., 846. Where interrogatories are filed, and the oposite party, after notice, fails to file cross interrogatories, the commission may issue without them. The Norway, 1 Ben., 493. Trevall v. Bache, 5 Cranch., C. C., 463. Where an oral examination is asked for, the practice is to propound particular interrogatories directed to the special matters inquired into, and to subjoin a general interrogatory as to any matter, within the knowledge of the witness, that is material. Rhoads v. Selin, 4 Wash., C. C., 715. For form of general interrogatory, see United States Equity Rule 71, and Pennsylvania Equity Rule 57. Also Smith v. Cokefair, 1 Pa., C. C., 48. The omission to answer the general interrogatory is fatal to the depositions. Richardson v. Golden, 3 Wash., C. C., 109. Objections to leading or irrelevant interrogatories should be made before the commission issues, or they will be regarded as waived. Hill v. Canfield, 63 Pa., 77. Crocker v. F. H. & B. Co., 1 Story, 169. On a commission to a remote jurisdiction the opposite party may reserve his examination, either oral or by cross interrogatories, until the direct testimony has been returned. Maryland Trust Co. v. Kirby Lumber Co., 149 Fed., 443.

Either party has the right, except under extraordinary circumstances, to have the testimony taken orally. Bischoffscheim v. Baltzer, 10 Fed., 1. Edison Electric Co. v. Westinghouse, 138 Fed., 460. Encyclopædia Britannica v. Werner, Ibid, 461. Maryland Trust Co. v. Kirby Lumber Co., 149 Fed., 443. And this applies to depositions taken abroad. Cortes v. Tannhauser, 18 Fed., 667. Edison Electric Co. v. Westinghouse, 138 Fed., 460. Compania Azucarera Cubana v. Ingraham, 180 Fed., 516. The defendant may cross-examine orally even though the

plaintiff has filed interrogatories; but where that is done the plaintiff may withdraw his interrogatories and examine the witness orally. Cortes v. Tannhauser, 18 Fed., 667. A witness will be compelled to answer all questions which may possibly be material. Perry v. Rubber Tire Co., 138 Fed., 836. It is not the duty of the judge or court within whose jurisdiction depositions are being taken for use elsewhere, when applied to to compel the production of evidence, to determine its competency or materiality. Dowagiac Mfg. Co. v. Lochren, 143 Fed., 211. A person cannot be compelled to attend and have his depositions taken on commission in a district where he does not reside. Tomlinson v. Moore, 189 Fed., 845. The remedy for the refusal of a witness to testify or to produce material evidence is not by a suppression of the depositions; the witness should be compelled by order. Scherer v. Everest, 168 Fed., 822. Bills of discovery will not be sustained where the information can be obtained by depositions, by a cross-examination of plaintiffs, at or before the trial, by examination of public records, or by notice to produce documents. Miller v. Moise, 168 Fed., 940.

A commission is the proper method of securing the testimony of foreign witnesses which cannot be taken de bene esse on rule. Compania Azucarera Cubana v. Ingraham, 180 Fed., 516. And a commission which is to be executed abroad may be executed before a secretary of legation or consular officer. Rev. Stat., Sect. 1750. The return to a commission so executed abroad should be as provided by Rev. Stat., Sect. 875. Where testimony is taken on a commission in a foreign country, the fees and mileage of witnesses are taxable, the same as though they attended in court at the trial. Agius v. Perkins, 151 Fed., 958.

An attorney fee of $2.50 is taxable for each witness examined if the depositions are admitted in evidence. Missouri v. Illinois, 202 U. S., 598. This fee is only allowed for depositions which are admitted at the trial. Michigan Aluminum Foundry Co. v. Aluminum Co., 190 Fed., 903. When not admitted no fee is taxable. United States v. Venable Construction Co., 158 Fed., 833. It only applies also to depositions taken out of court. Kissinger Co. v. Bradford Co., 123 Fed., 91. It has no application to an admiralty case not heard on depositions but before a judge in open court. Eriksson v. Grandfield, 193 Fed., 296.

(*b*) Letters Rogatory. The subject of letters rogatory is covered by Rev. Stat., Sects. 875, 4071-4074. For forms, see 1 Loveland Fed. Forms, Nos. 185 and 186. Originally foreign depositions could only be taken on commission. Stein v. Bowman, 13 Pet., 219. The difference between letters rogatory and a commission is that the one is to be executed according to the laws of the country to which it goes, and the other according to those of the country from which it comes. 6 Encycl. Plead. & Prac., 497. Kuehling v. Leberman, 9 Phila., 160. Letters rogatory must be resorted to where the rules of the foreign country do not permit of the execution of a commission there. Nelson v. United States, Pet., C. C., 235. Winthrop v. Union Insurance Co., 2 Wash., C. C. 7. Anon, 59 N. Y., 313. The same strictness is not required in the execution of letters rogatory as in the case of a commission. Ibid. Kuehling v. Leberman, 9 Phila., 160.

EXECUTIONS.

Rule 56. All remedies, by execution or otherwise, given by the laws of the State of Pennsylvania, to reach the property of a judgment debtor in common law cases, are adopted and made applicable to like cases in which a judgment is recovered in this court.

This rule is expressly authorized by Rev. Stat., Sect. 916. As to any particular form of execution the state law must be adopted as a whole. McCracken v. Hayward, 2 How., 608. The warrant of arrest given by Act (Pa.), of 1842 is such a remedy. Johnson v. Crawford, 154 Fed., 761. Ex parte Crawford. Ibid, 769. So are so-called garnishee or supplementary proceedings. Canal & Claiborne Street Railway v. Hart, 114 U. S., 654. Ex parte Boyd, 105 U. S., 647. Where a state is divided up into districts executions run into and may be executed in any part of it. Rev. Stat., Sect. 985. Act 3 March, 1911, Sect. 52 et seq 36 Stat., 1101. And a writ directed to the marshal of one district may be executed by the marshal of another. Prevost v. Gorrell, 5 W. N. C., 151.

By Act Aug. 1, 1888, 25 Stat., p. 357, where the laws of a state required a judgment or decree of a State Court to be registered, recorded, docketed, or indexed, or any other thing to be done in a particular manner before a lien shall attach, this was made applicable to judgments in the Federal Courts, provided the state authorized the judgments and decrees of such courts to be so recorded. And this has been done in Pa. by Act 24, June, 1895, P. L., 247. But the Act of Aug. 1, 1888, has been repealed by Act of Aug. 17, 1912. 37 Stat. —, to take effect January 1, 1913. The lien of such judgments will therefore hereafter be general throughout the state. Massingill v. Downs, 7 How., 760. Bayard v. Lombard, 9 How., 530. Prevost v. Gorrell, 5 W. N. C., 151. Ex parte McGill, 6 Pa., 504.

Rule 57. No execution shall be stayed without notice to the plaintiff or his attorney of the time and place of applying for such stay and opportunity given to be present and oppose the same. Nor shall any stay become operative until after a levy has been made and the marshal has been secured therein if security be required.

The lien of a fi. fa. ends with the return day unless there has been a levy. Sturges' Appeal, 86 Pa., 413. But the time of the levy is not affected by taking a forthcoming bond. McGinnis v. Prieson, 85 Pa., 111. To retain the effect of the levy a *vend. exp.* should be issued. An alias fi. fa. works an abandonment. Missimer v. Ebersole, 87 Pa., 109.

Application for a stay, after the mandate has come down from the court of appeals, to allow the party to apply for a certiorari to the Supreme Court, should be made to the district court and not the court of appeals. Oceanic Steam Navigation Co. v. Watkins, 188 Fed., 909. And see Bost. & Maine R. R. v. Gokey, 150 Fed., 686.

Rule 58. Where the defendant in an execution claims the benefit of the $300 state exemption, the marshal when

practicable, shall give notice to the plaintiff or his attorney of the time and place of making the appraisement and afford him an opportunity to be present thereat.

The defendant is entitled to be present as a matter of right. Huddy v. Sproule, 4 Phila., 353. Ruhl v. Crawford, 13 W. N. C. 13 Rosenthal v. Liberman, Ibid. 550.

Rule 59. Upon the filing of an inquisition extending or condemning real estate, notice thereof shall be forthwith given by the clerk by mail to the respective parties or their attorneys, and exceptions if any thereto shall be filed within five days thereafter, or otherwise the inquisition shall be approved as of course.

A vend. exp. issued without an approval of the inquisition will be set aside on application of the defendant, before a sale, if no rights of others have attached. Flick v. McComsey, 10 Lanc. Bar, 197. But no one but the defendant can take advantage of this, and he must apply within a reasonable time. Crawford v. Boyer, 14 Pa., 380. Where no exceptions are filed to the inquisition, the approval is a merely ministerial act, of which the issuance of the vend. exp. is the equivalent. Fuller v. Sheridan, 2 Luz. Leg. Reg., 207.

IGNORAMUS.

Rule 59 a. Every indictment returned ignoramus by the Grand Jury shall be entered by the clerk in the criminal docket as a separate case, the same as if it had been returned a true bill.

JUDGMENTS.

Rule 60. Judgments by default, in accordance with the rules (*a*), may be entered by the clerk (*b*), and the amount, to which the plaintiff is entitled, be assessed by him where it is set forth with certainty in the declaration or statement, or may be rendered so by calculation (*c*).

[West. Dist. (Pa.), Rule 17, Sect. 2.]

(*a*) For judgment by default for want of an appearance, see Rules 20 and 26, supra; and for want of an affidavit of defence, see Rules 10 to 13 inclusive, supra.

(*b*) Authority for this rule is to be found in Act (Pa.), April 22, 1889, P. L., 41. Lumber Co. v. Home Ins. Co., 167 Pa., 231. Johnson v. Royal Ins. Co., 218 Pa., 423. But in ejectment the Court must be moved for judgment for want of an appearance. Thompson v. Owen, 8 Kulp, 36.

(*c*) Where the damages are unliquidated, a writ of inquiry may be issued, directed to the marshal. Kohler v. Luckenbaugh, 84 Pa., 258; or they may be assessed by order of Court, in the nature of such

a writ, by a jury in attendance thereon. Act (Pa.), May 22, 1722. Sect. 27. 1 Sm. Laws, 144.

For form of such order, see Wright v. Crane, 13 S. & R., 446. In a proper case such an inquest is a matter of right. Bell v. Bell, 9 Watts, 47.

The assessment of damages, by inquest at bar, must be made as to all the defendants, if made as to any. Cridland v. Floyd, 6 S. & R., 411. Bennet v. Reed, 10 Watts., 396. Ridgely v. Dobson, 3 W. & S., 118. Day v. Brawley, 1 Pa., 429. Where judgment by default has been entered for a specified amount, when it should have been assessed as provided by the statute, it will be stricken off on motion. McMicken v. Commonwealth, 58 Pa., 213. Bank v. Messinger, 6 Pa. Co. Ct., 609.

The defendant after the entry of an interlocutory judgment has not the right to demand that damages shall be assessed by a jury attending the next Court instead of by a writ of inquiry to the sheriff. American Soda Water Company v. Taggart, 46 Pa. Super. Ct., 123.

As to lien of judgments being co-extensive with the state, see note to Rule 56, supra.

Rule 60 a. Judgment may be entered, debitum sine breve, on written confession or warrant of attorney in conformity with the state practice, where the court by proper averments in the praecipe for judgment is shown to have jurisdiction, by reason of the amount involved and the residence and diverse citizenship of the parties.

But no such judgment shall be entered where the confession or warrant of attorney is over ten years old, without leave of Court, being first obtained on affidavit of due execution thereof, and that the money is unpaid, and the parties living; nor where the confession or warrant is over twenty years old, without a rule to show cause similarly obtained and served upon the defendant.

Judgment by confession or on warrant of attorney is authorized in the Federal Courts on the principle that there is a dispute or controversy sufficient to give jurisdiction, where there is a demand by the plaintiff against the defendant, which has not been satisfied. Metropolitan Receivership, 208 U. S., 90.

MARSHAL'S SALES.

Rule 61. Whenever any real estate, sold by the marshal on execution, is bought by a lien creditor, who appears from the proper records to be entitled as such to receive the whole or any portion of the proceeds, it shall be the duty of the marshal to accept, in satisfaction of his bid, the receipt of such purchaser for the amount that he appears to be entitled to, as shown by a certificate from the records, a special re-

turn of which shall be made with such certificate attached. And, if upon exceptions filed, it is found by the court that he is so entitled, the sale shall be approved; or otherwise it shall be set aside, and a resale directed, unless the purchaser within ten days shall pay to the marshal the amount of his bid, or the amount thereof to which he is found not to be entitled.

[East. Dist. (Pa.), Rule 15, Sects. 2 to 9, inclusive. West. Dist., Rule 20.]

This subject is regulated in Pennsylvania by Act April 20, 1846. P. L., 411. The right to an issue on disputed facts is there provided for, but is omitted from the above rule, as not being consistent with the federal practice.

Rule 62. Marshal's deeds, for real estate sold on execution, shall be acknowledged in open court on the first Wednesday of each term, at ten o'clock in the forenoon; but before the acknowledgment of any deed is taken the process upon which the sale was made shall be duly returned and filed. Exceptions to any sale, or to the right of the purchaser, as a lien creditor, to apply his lien in satisfaction of his bid, shall be filed before the acknowledgment is taken; upon which such proceedings shall be had as may be called for thereby.

[East. Dist. (Pa.), Rule 15, Sects. 1 to 9, inclusive. West. Dist., Rule 20.]

See also Rules 36-38, supra, with regard to auditors.

NATURALIZATION.

Rule 63. Petitions for naturalization of aliens (*a*), and for the cancellation of naturalization certificates, shall be heard at Scranton on the last Thursday and Friday of each month, except October; and at Harrisburg and Williamsport at the regular terms of court at each of said places.

(*a*) By Act of Congress of June 29, 1906, Sect. 6, 34 Stat., p. 598, petitions for naturalization are to be heard at stated times fixed by rule of court not less than ninety days after filing the same, and notice posted; and no person shall be naturalized, nor any certificate of naturalization issued, within thirty days of any general election.

Rule 63 a. In every petition for naturalization, on which no final order has been made within one year after the date of the filing thereof, the clerk of the court shall cause a notice to be mailed to the last known address of the petitioner, to the effect, that the said petition will be dismissed,

unless such petitioner shall appear in Court with his witnesses for the final hearing of his petition on one of the regular days set for the hearing of naturalization matters within thirty days after the date of such notice, or shall within such time show cause to the Court for his failure to so appear; and in all cases in which such notices are sent, and the petitioner neglects or fails to appear or show cause, on due proof thereof the petition shall thereupon be dismissed.

Rule 63 b. It appearing to the Court, upon the representation of the Department of Commerce and Labor,

That in accordance with rule six of the regulations made pursuant to the twenty-eighth section of the Act of Congress approved June 29, 1906, relating to naturalization, for carrying into execution the provisions thereof, duplicates of all declarations of intention to become a citizen of the United States made as provided in the fourth section of said act are forwarded by the several clerks of court before whom made to the Bureau of Immigration and Naturalization, Division of Naturalization, of the Department of Commerce and Labor; that petitions for naturalization are also forwarded to the said Division of Naturalization in accordance with the twelfth section of said Act and rule seven of the regulations;

That upon examination of the said Division it is frequently found that such declarations and petitions are defective in that they contain errors or omissions, or otherwise apparently fail to conform to the requirements of said Act;

That in ordinary course such defects would not be disclosed in declarations until at least two years thereafter, when a petition for naturalization may be filed and heard, and when, if such defects are material, the declaration may be held insufficient to support a final order of naturalization and the declarant may be required to file a new declaration and wait two years longer before filing a petition for naturalization;

That such defects, when the facts allow, and especially where due to mistake, oversight or misunderstanding, may often readily be cured, if specifically pointed out; and

That the adoption of a simple procedure for the amendment of such declaration of intention or petition for naturalization so found to be defective is desirable, with a view to relieving the declarant or petitioner of a possible hardship, to conserving the time of the court, and to promoting uniformity and efficiency in the administration of the Act;

It is ordered, That whenever such a duplicate declaration of intention or petition for naturalization as aforesaid is returned to the clerk of this court by the said Bureau of Immigration and Naturalization, Division of Naturalization, and attention is called to errors, omissions or other defects therein, the alien declarant or petitioner concerned, on appearing in person before the said clerk, with his witnesses if necessary, and with the copy of the declaration previously given to him, shall have leave, if the facts allow, to amend the said declaration or petition by making the same conform to the requirements of the statute in that behalf enacted; and it shall be the duty of the said

clerk to note upon the several copies of the declaration or petition originally filed, in such manner as to disclose the nature thereof, the particular amendments made, and the date of making the same, and to file as part of the record of the proceeding the letter of the said Division of Naturalization returning the said declaration or petition for correction; and when such declaration of intention or petition for naturalization shall have been amended as aforesaid the same shall be deemed effective as of the date when it was originally made or filed: Provided, however, That all questions, concerning the sufficiency of such declarations or petitions, before or after amendment, as to whether the same could be cured by amendment, and respecting the propriety and sufficiency of the amendments made, shall be reserved for the determination of the court at such time as they may properly come before it for decision;

And it is further ordered, That no fees in addition to or other than those prescribed by law and originally charged on account of such declarations or petitions shall be collected by the said clerk from any alien amending his declaration of intention or petition for naturalization as aforesaid.

NEW TRIALS.

Rule 64. A motion for a new trial (*a*), for judgment on points reserved (*b*), to take off a compulsory nonsuit, or in arrest of judgment, must be made and the reasons therefor filed within four days after verdict (*c*).

[East. Dist. (Pa.), Rule 17, Sect. 1.]

(*a*) A mere motion for a new trial is not enough; it must receive recognition by the Court in order to permit of consideration at a subsequent term. Klein v. Southern Pacific Co., 140 Fed., 213. As a condition to refusing a new trial the court may require the plaintiff to submit to a reduction of the damages. Scheu v. Penna. R. R., 141 Fed., 495. When the trial judge dies pending a rule for a new trial, his successor may pass on the question, if he is fairly satisfied that he can do so intelligently. United States v. Meldrum, 146 Fed., 390. Where a verdict is inconsistent on its face, and shows an abuse of power, as where the jury gave nominal damages only, when the plaintiff was entitled to substantial damages if entitled to recover at all, the obligation to grant a new trial is positive, and a refusal may be reversed on error. Pugh v. Bluff City Excursion Co., 177 Fed., 399. The refusal of the court to consider a motion for a new trial made in time and sustained by affidavits showing proper grounds is the denial of a right which calls for a reversal. Mattox v. United States, 146 U. S., 140; Felton v. Spiro, 78 Fed., 576; Ogden v. United States, 112 Fed., 523. So also is the granting of a new trial for unjustifiable reasons. James v. Evans, 149 Fed., 136; or the refusal of the trial court to exercise the discretion which it has to award a new trial, on a misconception of its powers. Dwyer v. United States, 170 Fed., 160. But to make the refusal error the application must involve something new and not passed upon at the trial. Gourdain v. United States, 154 Fed., 453. A motion for a new trial is not essential to the prosecution of a writ of error, even though required by the state practice. Aaron v. United States, 155 Fed., 833. Boatmen's Bank v. Trower, 181 Fed., 804.

(*b*) The Federal Courts will follow the State Law with regard to entering judgment non obstante veredicto. Fries-Breslin Co. v. Bergen, 176 Fed., 76. Troxell v. D. L. & W. R. R., 180 Fed., 871. Smith v. Jones, 181 Fed., 819. Western Bank Note Co. v. Slentz, 188 Fed., 57. The defendant must ask for a directed verdict to make the refusal of judgment non obstante veredicto to be error. Missouri K. & T. Co. v. Collier, 157 Fed., 347. An exception must be taken to the refusal of such judgment if a writ of error is to be prosecuted. Philadelphia v. Bilyeu, 36 Pa. Sup. Ct., 562. International Savings & Trust Co. v. Printz, 37 Pa. Sup. Ct., 134. Hatcher v. North West. Insurance Co., 184 Fed., 23. An exception by the plaintiff to the allowance of such judgment in favor of the defendant is too late after the next term has begun. McCord v. Baltimore & Ohio R. R., 187 Fed., 743. There can be no motion for judgment non obstante veredicto where the jury disagree. McKinnon v. Rynkievicz, 145 Fed., 863.

(*c*) In Pennsylvania a new trial may be granted after the term and after judgment rendered, under the equitable powers of the Court, for fraud in obtaining the verdict. Fisher v. Ry. Co., 185 Pa., 602. But the remedy in the Federal Courts in such case would seem to be by bill. O'Connor v. O'Connor, 142 Fed., 449.

Rule 65. No motion for a new trial shall be made after a motion in arrest of judgment or for judgment on a reserved point, but such motions may be made together.

A motion by plaintiff for a new trial conditioned on the Court's deciding in favor of the defendant on a rule for judgment non obstante veredicto, is not objectionable. Usher v. Scranton Railway Co., 132 Fed., 405.

The state practice with regard to entering judgment non obstante veredicto is applicable to actions at law in the federal courts. Fries-Breslin Co. v. Bergen, 176 Fed., 76. Troxell v. D., L. & W. R. R., 180 Fed., 871.

Where a judgment non obstante is reversed, a new trial, instead of the entry of a final judgment, may be granted. Hughes v. Miller, 192 Pa., 368. Western Bank Note Co. v. Slentz, 188 Fed., 57.

A rule for a new trial must be disposed of before judgment for the defendant non obstante veredicto is entered. Walters v. American Bridge Co., 234 Pa., 7.

Rule 66. A motion for a new trial on the ground of after discovered evidence, in addition to the other requirements, must be accompanied by the affidavits of the witnesses relied upon, giving the substance of their testimony and stating why it could not have been procured before.

This is a reasonable rule. Dietrick v. Lancaster, 212 Pa., 566; and is of general prevalence, 29 Cyc., 998. But when it is impossible or impracticable to obtain such affidavits it will be excused; as for instance where the witnesses are out of the state; Brown v. Speyers, 20 Gratt. (Va.), 296; Smith v. Cushing, 18 Wis., 295; or in the employ of the opposite party. Payan v. United States, 15 Ct. Claims, 56.

NOTICES.

Rule 67. All notices, when not otherwise expressly provided, shall be in writing, and when given in pursuance of these rules may be served on the opposite party or his attorney, in the manner prescribed for the service of a summons. If the notice be in pursuance of a rule granted by the court, a copy of the rule shall be prefixed to the notice.

[East. Dist. (Pa.), Rule 19. West. Dist., Rule 21.]

The following notices are provided for in these rules:

	Rule
Audit to distribute proceeds of judicial sale; 3 weeks advertisement and 10 days posting in clerk's office	36
Auditor's report, intention to file; 10 days	38
Bail, justifying of; 10 days	42
Bail, taking of new; 5 days	42
Commission to take testimony, application for; 5 days	55
Costs, retaxation of; 5 days	48
Declaration or statement, filing of; 15 days before return day	10
Depositions, execution of rule to take; 5 days if within the circuit; 10 days if outside the circuit	53
Document, execution of, rule to admit; 15 days	8
Ejectment, rule on defendant to appear and plead; 15 days, not sooner than second term	71
Ejectment, rule on defendant to file answer and abstract; 15 days after appearance	71
Execution of document, rule to admit; 15 days	8
Exhibit, referred to in depositions, to produce at argument or trial; 10 days	7
Inquisition on real estate; Forthwith	59
Inquisition, exceptions to; 5 days thereafter	59
Interrogatories, rule on garnishee to answer; 15 days	27
Letters rogatory, application for; 5 days	55
Naturalization, dismissal of petition; 30 days	63 a.
Rule to admit or deny petition for rule to show cause; 15 days	9
Rule on plaintiff to declare; 15 days	70
Rule on defendant in ejectment to appear and plead; 15 days, not sooner than second term	71
Rule on defendant in ejectment to file answer and abstract; 15 days after appearance	71
Rule on defendant in other actions to plead; 15 days after service of declaration	72
Statement or declaration, filing of plaintiff's; 15 days before return day	10
Setoff, for specification of; 15 days	76
Viewers, application for appointment of; 10 days	47

PLEADINGS (*a*).

Rule 68. The pleadings in all actions (*b*) shall be the same as may from time to time be prescribed by the state law (*c*).

(*a*) It is only in the absence of remedies by regular pleadings that motions can be made available to settle important questions of law. Illinois Central R. R. v. Adams, 180 U. S., 28, 38. Scully v. Bird, 209 U. S., 481, 486.

(*b*) ASSUMPSIT AND TRESPASS. By Act (Pa.), May 25, 1887, P. L., 271, the plaintiff's declaration in assumpsit and in trespass shall consist of a concise statement of his demand, which, in assumpsit, shall be accompanied by copies of all notes, contracts, book entries, or a particular reference to the records of any Court within the county, upon which the case is founded; and a reference to such record, or the record of any deed, mortgage or other instrument of writing recorded in the county, shall be sufficient in lieu of a copy thereof. The statement shall be signed by the plaintiff or his attorney, and in the action of assumpsit shall be replied to by affidavit.

It may be provided by rule of court under this statute that the statement in both assumpsit and trespass shall be sworn to. Edison Gen'l Electric Co. v. Thackara Mfg. Co., 167 Pa., 530. Kauskoff v. Stern, 19 Phila., 328.

The plaintiff's statement must be self sustaining. Rosenblatt v. Weinman, 230 Pa., 536. It must set forth the plaintiff's claim with sufficient particularity to enable the defendant to plead understandingly with full knowledge of every claim that can be made or question that can be raised under it at the trial. Park v. Standard Spinning Co., 135 Fed., 860. But it is too late to demur to it after filing an affidavit of defence. Heller v. Royal Ins. Co., 151 Pa., 101. The amount claimed in it must exceed the jurisdictional limit required in the Federal Courts, whether such jurisdiction is based on diverse citizenship or because the case is one arising under the Federal constitution and laws. Turner v. Jackson Lumber Co., 159 Fed., 923. The amount demanded, however, and not the amount recovered is the test of jurisdiction, unless it appears to a legal certainty that the sum demanded is not the amount in dispute, or is fictitious or colorable. Hampton Stave Co. v. Gardner, 154 Fed., 805.

It is not necessary in a scire facias on a mortgage any more than in assumpsit to file a copy of the mortgage, provided the date and place of recording are stated. Act (Pa.), March 12, 1842, Sect. 3. P. L., 66.

REPLEVIN. The plaintiff's declaration in replevin must be verified by oath and set forth the facts upon which his title to the goods and chattels is based; and the defendant or party intervening must file an affidavit of defence within fifteen days, denying the plaintiff's title, and showing his own. Act (Pa.), April 19, 1901, Sects. 4 and 5. P. L., 89. As to what is a sufficient statement in replevin, see Heisley v. Economy Co., 33 Pa. Sup. Ct., 218.

EJECTMENT. The plaintiff in ejectment shall file a declaration consisting of a concise statement of his cause of action with an abstract of the title under which he claims the land in dispute; to which the defendant, in addition to the plea of "not guilty," shall file an answer in the nature of a special plea, setting forth the grounds of

his defence, with an abstract of the title by which he claims; and no action of ejectment shall be considered at issue until the plaintiff's statement and the defendant's plea and answer shall be filed; nor shall any evidence be received on the trial of the action of any matter not appearing in the pleadings; subject, however, to the power of amendment. Act (Pa.), May 8, 1901, Sect. 2. P. L., 143.

A description of the land, with the number of acres which the plaintiff claims, to be filed on or before the first day of the term to which the process is returnable, would also seem to be required. Act March 21, 1806, Sect. 12. 4 Smith's Laws, 332.

PLEAS. Non-assumpsit is the general issue in assumpsit; in addition to which, payment, set-off, and the statute of limitations may be pleaded; but no other plea. And the only plea in trespass is "not guilty." Act (Pa.), 25 May, 1887, Sect. 7. P. L., 272; as it is in ejectment. Act April 13, 1807, Sect. 4. 4 Smith's Laws, 479; except that a special plea, giving an abstract of the defendant's title is required in ejectment, by Act of May 8, 1901. Sect. 2, P. L. 143.

All pleadings are also made subject to the rules which may be prescribed with regard to the notice of special matter. Act (Pa.), May 25, 1887, Sect. 7, P. L., 272. See such rule infra, Rule 76.

Notwithstanding these statutory restrictions, a plea in abatement is still admissible. Campbell v. Galbreath, 1 Watts, 70. S. C. 5 Watts, 423. Zeigler v. Fisher, 3 Pa., 365. Becker v. Lebanon St. Railway, 25 Pa. Sup. Ct., 367. So is a plea of the statute of limitations in an action of trespass. Kulp v. Snyder, 94 Fed., 613. Dickerson v. Central Railroad, 7 Dist. (Pa.), 104. Or a special plea of res judicata, Troxell v. D. L. & W. R. R., 185 Fed., 540. The defendant is also entitled to plead specially that he acted as judge with regard to the matters complained of. English v. Ralston, 112 Fed., 272.

Under a plea of the general issue in trespass any evidence may be offered which would have been admissible under a special plea. Fisher v. Paff, 11 Pa. Sup. Ct., 401. Such for instance as a release of damages. Johnson v. Philadelphia & Reading Railroad, 163 Pa., 127. Or evidence of title in trespass to real estate. Edwards v. Woodruff, 25 Pa. Sup. Ct., 575. And the plaintiff may reply by any competent and relevant evidence. Fisher v. Paff, 11 Pa. Sup. Ct., 401.

(*c*) By Rev. Stat., Sect. 436; "The practice, pleading and forms and mode of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the Courts of record of the state within which such Circuit and District Courts are held; any rule of Court to the contrary notwithstanding."

But absolute conformity with state practice is not required. English v. Ralston, 112 Fed., 272. Swift v. Jones, 145 Fed., 489. Hein v. Westinghouse Air Brake Co., 164 Fed., 79. St. Charles v. Stookey, 154 Fed., 772. Nor is a Federal Court bound to change its rules to conform to changes in the state practice. Shepard v. Adams, 168 U. S., 618. Bost. & Maine R. R. v. Gokey, 210 U. S., 155. The state practice may be changed and adapted so as to accomplish the relief intended to be given by the Federal law. Hills v. Hoover, 220 U. S., 329. Richardson v. Bosselman, 164 Fed., 781. Debt is the appropriate action to recover on a judgment, and although under the state law, it is denominated assumpsit, the applicable principles are those of debt at common law. Du Bois v. Seymour, 152 Fed., 600.

Rule 69. If no declaration or statement be filed by the plaintiff within a year after action brought (*a*), a non pros. shall be entered on praecipe to the clerk, as of course (*b*).

[East. Dist. (Pa.), Rule 18. West. Dist., Rule 24, Sect. 2.]

(*a*) The year is to be counted from the return day of the writ (original or alias) by which the defendant is brought in. Everett v. Niagara Ins. Co., 142 Pa., 322. Even after a statement has been filed there may be a non pros, if there has been unreasonable delay in proceeding with the action. Waring Bros. v. Pennsylvania R. R., 176 Pa., 172. But not in an action involving the title to land short of the time giving title by adverse possession. Hillside Coal & Iron Co. v. Heermans, 191 Pa., 116. A non pros. for want of a declaration will be taken off for cause shown. Wood v. Harrison, 14 Dist. (Pa.), 822. If a declaration is filed before a non pros. is entered, even though after the year, it will be in time. Ellis v. Donaghy, 6 W. N. C., 541.

(*b*) This does not apply to replevin, which, under Act (Pa.), April 19, 1901, P. L. 88, has a complete code of its own. Ott v. Miller, 16 Dist. (Pa.), 140.

Rule 70. In every case where the defendant's appearance is entered, a rule on the plaintiff to declare is of course, and may be entered at any time after the return day; on fifteen days' notice of which, if the plaintiff's declaration or statement be not filed, the defendant shall be entitled to a judgment of non pros.

[East. Dist. (Pa.), Rule 20, Sect. 1. West. Dist., Rule 24, Sect. 1.]

This is the rule by statute in replevin. Act (Pa.) April 19, 1901. Sect. 4, P. L., 89.

The clerk may enter the judgment sec. reg. Act (Pa.) April 22, 1889. P. L., 41. Rule 60, supra.

A non pros. for want of a declaration does not prevent a new suit, if not otherwise barred. Derrickson v. Colonial Trust Co., 17 Dist. (Pa.), 80.

Rule 71. In the action of ejectment, if the plaintiff's declaration and abstract (*a*) have been filed on or before the return day of the writ (*b*), the defendant shall appear and plead on or before the first day of the second term (*c*); and within fifteen days thereafter shall file his answers and abstract (*d*). If the plaintiff's declaration and abstract have not been so filed, they may be filed at any time thereafter, and upon service of a copy thereof on the defendant he shall be required to appear and plead within fifteen days, not sooner however than the first day of the second term; and within fifteen days more he shall file his answer and abstract.

[West. (Pa.), Dist., Rule 13, Sects. 1 and 3.]

(*a*) The purpose of an abstract is to narrow the issues and to limit the proofs. Davis v. Brothers, 152 Fed., 696. All that needs to be shown by the plaintiff's abstract is his claim of title. A description of the land is to be given by the declaration. Reading v. Seip, 1 Lehigh Val., 15. The plaintiff is not entitled to a judgment by default unless his abstract shows a prima facie case. Wirt v. Bertles, 12 Luz. Leg. Reg., 45. Where the plaintiff's abstract and declaration fail to show title, a non pros. may be entered. Hunter v. Bonbright, 17 Dist. (Pa.) 188. But see Davis v. Brothers, 152 Fed., 696. If he goes to trial on an insufficient declaration and abstract, he does so at his peril, as no evidence can be received outside of it. Fuller v. Railroad, 12 Luz. Leg. Reg., 175. Wescott v. Crawford, 210 Pa., 256.

(*b*) The plaintiff's declaration must be filed before the return day of the writ in order to justify a judgment by default for want of an appearance. Lorenz v. Berry, 207 Pa., 296.

(*c*) The defendant in ejectment is not bound to appear or do anything until the second term. Act March 21, 1806, Sect. 12. 4 Smith's Laws, 332. Vanderslice v. Garven, 14 Serg. & Rawle, 272. Young v. Cooper, 12 Phila., 331. This is not changed by the act of 1836. Ellison v. Hammen, 2 T. & H. Prac., Sect. 1850. Nor by the act of 1901. Lorenz v. Berry, 207 Pa., 296.

(*d*) The Courts may fix by rule the time within which the defendant's answer and abstract shall be filed. Act May 8, 1901, Sect. 2. P. L., 142. A defendant who makes no claim of title must enter a disclaimer if he wishes to avoid costs. Steinmets v. Logan, 3 Watts, 160. McCanna v. Johnston, 19 Pa., 434. Kirkland v. Thompson, 51 Pa., 216. Lehigh Val. Coal Co. v. Beaver Lumber Co., 203 Pa., 544. A disclaimer is not properly a plea. Kirkland v. Thompson, 51 Pa., 216. It merely operates as an estoppel of record, as to the land disclaimed. Greeley v. Thomas, 56 Pa., 35. A judgment for want of a specific answer is not justified. McCloskey v. O'Hanlan, 35 Pa., Sup. Ct., 95.

Rule 72. In all other actions, the defendant shall file a plea within fifteen days after the return day of the writ, provided the plaintiff's declaration or statement has been filed on or before the return day and notice thereof given. If not so filed, it may be filed at any time thereafter, and the defendant shall enter a plea within fifteen days after the service of a copy upon him.

This rule and the one following are based on the Act of May 25, 1887, Sect. 7, P. L., 272, which superseded the previous practice. Howen v. Bennett, 4 Dist. (Pa.), 196. While a rule on the plaintiff to give security for costs suspends a rule on the defendant to plead, when security has been entered the defendant is in default without further notice, if he fails to plead within the residue of time stipulated in the rule. American Mfg. Co. v. Morgan Smith Co., 25 Pa., Sup. Ct., 176. But the plaintiff need not plead to a defective statement. Bill Posting Sign Co. v. Jermon, 27 Pa. Sup. Ct., 171.

Rule 73. Should the defendant fail to plead in any case at the time required by the rules, the clerk on praecipe of the plaintiff shall enter a plea of the general issue.

A plea entered for the defendant by the clerk, by default, is as binding as if entered by the defendant himself. Connell v. Nicol, 2 Lack. Leg. News, 177.

By a plea of the general issue is meant a plea that will put at issue the general questions involved in the action. It may not always be easy to say just what this is, and where there is any doubt, counsel should indicate to the clerk, what they consider the appropriate plea. Scranton City v. Hull, 3 Lack. Leg. News, 98. In scire facias sur municipal lien, nil debet; payment, and payment with leave may be so regarded. Ibid.

Judgment by default for want of a plea may be authorized by rule, the same as for want of an appearance or affidavit of defence. Act. (Pa.) April 22, 1889, P. L., 41. Johnson v. Royal Ins. Co., 218 Pa., 423.

Rule 74. No dilatory plea shall be received unless verified by affidavit that the facts set forth therein are true, or probable cause be shown to the court conducing to the belief that they are true.

[East. (Pa.), Dist., Rule 20, Sect. 2.]

Taking any step looking to a trial on the merits is a waiver of a dilatory plea. Daley v. Iselin, 212 Pa., 279.

Where there is no formal plea to the jurisdiction, the plaintiff is not compelled to prove the jurisdictional facts averred in the declaration. Bitterman v. Louis. & Nash. R. R., 207, U. S., 205, 224. But see, Cole v. Carson, 153 Fed., 278. Lindsey Live Stock Co. v. Justice, 191 Fed., 163.

On a plea in abatement which is sustained, the only judgment is that the writ be quashed. Warner v. Lehigh Valley R. R., 16 Dist. (Pa.), 20.

Rule 75. Every demurrer, whether in its nature general or special, shall specify the particular grounds upon which it is based.

[East. Dist. (Pa.), Rule 20, Sect. 3.]

But a demurrer must not set up facts outside of the record, or it becomes bad as a speaking demurrer. Wright v. Weber, 17 Pa. Sup. Ct., 451. Pew v. Minor, 216 Pa., 343.

It is too late to demur to the plaintiff's statement after filing an affidavit of defence. Heller v. Royal Ins. Co., 151 Pa., 101.

A demurrer which challenges the jurisdiction of the court over the person of the defendant but also asks judgment on the merits amounts to a general appearance, and on being overruled the defendant is in court for all purposes. St. Louis & San Francisco R. R. v. McBride, 141 U. S., 127. Nelson v. Husted, 182 Fed., 921.

Rule 76. Where the defendant pleads set off; or a general plea is entered with leave to give special matter (*a*) in evidence, or to justify; upon notice by the plaintiff, a specification of the same shall be filed by the defendant in writing within fifteen days thereafter; in default of which no evidence

of such set off, special matter, or justification, shall be received (*b*).

[East. Dist. (Pa.), Rule 20, Sects. 4 and 5.]

(*a*) It is not enough that such special matter is set out in the affidavit of defence. Simons v. West, 2 M., 196. Sullivan v. Johns, 5 Whart., 366. Mershon v. Anderson, 40 W. N. C., 192. Nor is a reference over to the affidavit sufficient. Erwin v. Leibert, 5 W. & S., 103. But see Arnold v. Blahon, 147 Pa., 372.

The rule does not apply to anything admissible under the general issue. Walls v. Walls, 170 Pa., 48; such as a release of damages for personal injuries. Johnson v. Railroad, 163 Pa., 127; or the title to land in trespass. Edwards v. Woodruff, 25 Pa. Sup. Ct., 575. Taylor v. Lyon Lumber Co., 13 Pa. Co. Ct., 235. On a plea of payment, however, an equitable defence cannot come in, without notice of the special matter relied on. Lovegrove v. Christman, 164 Pa., 390. Nor in a Federal Court is an equitable defence available in an action at law. Brodhead v. Quarryville Nat'l Bank, 151 Fed., 713. And a counter claim must state facts which show a good cause of action against the plaintiff. Groton Bridge Mfg. Co. v. American Bridge Co., 151 Fed., 871.

(*b*) Rose v. Columbian Reinforced Concrete Co., 193 Fed., 403.

Rule 77. All pleadings and papers shall be accompanied by a copy to be left with the clerk, for the benefit of the opposite party; and all bills of exceptions, containing the evidence taken at the trial, shall be filed in duplicate for the convenience of the clerk in making up and certifying the record.

[See Rule 78, infra, as to records and papers not being removed from the clerk's office, the excuse for which is disposed of by the present rule.]

RECORDS.

Rule 78. No records or papers shall be allowed to be taken from his office, by the clerk; nor shall they be so taken by him, upon a subpoena duces tecum, or otherwise, except by leave of court.

[East. Dist. (Pa.), Rule 22, Sect. 2. West. Dist., Rule 27.]

For the English rule, see Taylor on Evidence, Sect. 1532.

A record may be proved by a compared or an officially certified copy. 14 Amer. & Eng. Encycl. Law, 2 Ed., 198. The original is always admissible. Williams v. Conger, 125 U. S., 397. Miller v. Hale, 26 Pa., 432. And sometimes may be necessary, as in case of perjury or forgery. Taylor on Evidence, Sect. 1535. But otherwise, by reason of danger of loss, it should not be removed. Ibid.

Rule 79. The satisfaction (*a*) or discontinuance (*b*) of a case, or the marking of it to the use of another, may be entered on the docket by the plaintiff or his attorney, being

attested by the clerk; but no one except the clerk shall make any other entries thereon.

[East. Dist. (Pa.), Rule 19, Sect. 4.]

(*a*) In moving for a satisfaction under the statute, the debt must actually have been paid. Felt v. Cook, 95 Pa., 247. Melan v. Smith, 134 Pa., 649. And so must the costs. York County v. Ling, 15 Dist. (Pa.), 153.

(*b*) A discontinuance must be by leave of court, but leave will be assumed to have been given in the first instance and will not be allowed to be withdrawn except where it involves some unjust disadvantage to the defendant or other interested party, which is not the fact simply because the case is at issue on a plea of set off. The discharge of a rule to strike off the discontinuance is the equivalent of original leave. Consolidated Nat'l Bank v. McManus, 217 Pa., 190.

Rule 80. Upon a writ of error or appeal being taken to the Circuit Court of Appeals, the parties may stipulate that certain parts only of the record are relevant, and they shall thereupon be printed and returned by the clerk at the expense of the party taking the appeal or writ. But in the absence of any such stipulation he shall certify and print the whole (*a*).

(*a*) There is very little, if anything, left to this rule by the changes in the law which have occurred since it was promulgated. By the rules of the Court of Appeals of this Circuit (Rule 23), which took effect March 1, 1910, the printing of the record is substantially committed to the clerk of that Court, who, for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, is entitled (Rule 29), to a fee of twenty-five cents for each printed page of record and index. There are other provisions with regard to what the record is to contain, which subject is treated at large in the rule, but the rule itself will have to be consulted with regard to them. It is there, however, among other things, provided (Sect. 8), that: "In any case where the record or any part thereof has been printed in the Court below, the same may be embodied in and used as the printed record of this court; provided, the manner and style of the printing shall correspond with the requirements of the several sections of this rule for printing done under the supervision of the clerk of this Court." This rule, however, in turn is modified by Act of Congress of February 13, 1911, 36 Stat., 901, where it is provided that the appellant or plaintiff in error shall print and file with the clerk of the Court of Appeals twenty-five printed transcripts of the record and all such part or abstract of proofs as the rules of the Circuit Court of Appeals may require, in such form as the Supreme Court shall prescribe, one of which printed transcripts shall be certified by the clerk of the lower Court under seal, and three copies thereof be furnished to the opposite party at least twenty days before the argument. It is further expressly provided that no written or typewritten transcript of the record shall be required. There is also a provision for utilizing the copies of the record so printed in case of an appeal to the Supreme Court. Apparently the clerk, under this statute, can make no charge for certifying the record, although, as the law stood before this Act was passed, he was entitled to fifteen cents (15c.) a folio for making

up and certifying it. Hoysradt v. D. L. & W. Railroad, 182 Fed., 880; but was entitled to nothing more than the cost of the printing, where that was undertaken. Thornton v. Insurance Co., 125 Fed., 250. Doherty Acct's, Bowler's Comp. Dec., 253.

Only such parts of the record should, in any case, be printed as are involved in the disposition of the case, and the practice of burdening it with others is to be discountenanced. Pennock v. Dialogue, 2 Pet., 115. No paper is to be considered a part of the record on review that is not made such by the pleadings or the opinion of the Court referring to it. Fisher v. Cockerell, 5 Pet., 248, 254. The opinion of the Court below should always be included. Teller v. United States, 111 Fed., 119. C. C. A. Rule 14, Sect. 3. No original papers are sent up except where necessary for inspection. Craig v. Smith, 100 United States, 226. Herman Keck Mfg. Co. v. Lorsch, 179 Fed., 485. But the appellate court may order any original document or other evidence to be sent up in addition to what is printed. Act Feb. 13, 1911, Sect. 1, 36 Stat., 901. C. C. A. Rule 14, Sect. 5. If the record as returned is too meagre, the appellate court, upon proper application, will supply what is omitted by a certiorari. Hoskin v. Fisher, 125 U. S., 217. Redfield v. Parks, 130 U. S., 623. C. C. A. Rule 20. In case the clerk is requested to include a paper by one party, and to leave it out by the other, he may apply to the Judge for instructions. Hoe v. Kahler, 27 Fed., 145.

The following order of Court has also recently been promulgated.

In order to conform the practice of the Clerk's office to the provisions of the "Act to diminish the expense of proceedings on appeal," passed February 13th, 1911, the following rules are adopted, viz.:

1. The printing of all transcripts of record on appeals or writs of error shall be prepared in the form and style required at the time by the Rules of the United States Circuit Court of Appeals for the Third Circuit.

2. The Clerk shall, on application of the appellant or plaintiff in error, deliver to him, or to his counsel, for the purpose of printing, such original pleadings, orders, proofs and papers filed in the case in which a transcript is desired, as may be required, and shall also furnish therewith copies of orders entered on the journal of the court which may not be in the files in said case.

A receipt, stating separately each filed paper, shall be given by the person or persons to whom they are delivered, to the Clerk and by him filed.

All papers taken from the Clerk's Office and for which such receipt is given, shall be carefully preserved and returned to the Clerk at the time the printed transcript is presented for certification.

3. Where a final decree or judgment of this court is sought to be reviewed on appeal to the United States Circuit Court of Appeals, the parties may agree, by written stipulation to be filed with the Clerk of this Court, that parts only of the record or of the proofs shall be printed.

4. If the appellant or plaintiff in error does not request the printing of the complete record and proofs but only a part thereof, and a stipulation is not filed with the Clerk, as provided in paragraph 3 of this rule, he shall immediately furnish the adverse party with a statement of such parts as he desires printed. The adverse party shall, within

ten days after receiving such statement, unless the time is extended by the court, file with the clerk a separate written statment of such additional parts of the record or proofs which he desires included in the printing.

The appellant or plaintiff in error shall cause transcripts to be printed containing all parts of the record or proofs designated by either of the parties in their written statements or by stipulation.
Entered, March 2, 1912.

Rule 81. The clerk's office and the permanent records of the Court shall be at Scranton (*a*), but auxiliary offices, with a deputy clerk at each, shall also be kept at Harrisburg (*b*) and at Williamsport, where suits may be begun, process (mesne or final) be issued, and papers be filed with the same force and effect as if done at Scranton.

(*a*) The Act of Congress of June 30, 1902, Sect. 2, 32 Stat., p. 549, provides that the permanent records shall be kept at Scranton, but authorizes the Court to provide by rule for the keeping of provisional or temporary records at Harrisburg and Williamsport, of such actions, suits or proceedings as may be there entered or brought.

(*b*) By Act March 3, 1911, Sect. 103, 36 Stat., 1123, the clerk of the district is required to maintain an office in charge of himself or a deputy at Harrisburg.

Rule 82. Where suit is brought at Harrisburg or Williamsport, the deputy clerk shall enter the case in a docket to be kept for the purpose, and shall thereupon issue the appropriate process under the seal of the court to bring in the defendant. He shall at the same time forward to the clerk at Scranton the original papers filed in the case, with an exact minute of the docket entries made and the process issued, retaining a copy of such papers, to be furnished by counsel. And the clerk shall make a similar entry of the case on the regular docket of the term in its order, assigning to it its proper number, a memorandum of which shall be sent to the deputy clerk and be adopted by him. And thereafter, any paper filed in the case, being furnished in duplicate by counsel for the purpose, shall be similarly treated, a copy being retained by the deputy clerk, and the original being forwarded to Scranton, with a minute of the entry made with regard to it. And any order, judgment or decree shall be likewise entered in the same terms in both places. Provided, that when process is issued, the marshal shall make return thereof at Scranton, of which a minute shall be sent to the deputy clerk at the place where suit was brought who shall note the same upon his record. And provided further, that

all searches and certificates shall be made at Scranton, and in case of any variance, the record as it is there shall be taken.

This and the preceding rule are based on Act June 30, 1902, 32 Stat., p. 549, which was an amendment to the act creating the district, and conforms thereto.

Rule 82 a. At the conclusion of every case the clerk shall make a final record by copying at large in a docket provided for the purpose, the pleadings, process and decree, together with such orders and memoranda as may be necessary to show the jurisdiction of the Court and the regularity of the proceedings.

As to final records see Rev. Stat. Sect., 750. The Thomas Fletcher, 24 Fed., 481. Blain v. Insurance Co., 30 Fed., 667. Jones v. United States, 39 Fed., 410, 413. Consolidated Store Co. v. Dettenthaler, 93 Fed., 307. United States v. Van Duzee, 140 U. S., 169. United States v. King, 147 U. S., 676, 684.

REMOVALS (*a*).

Rule 83. Where proceedings have been taken for the removal (*b*) from a state court of a civil suit or action (*c*), either party may forthwith file, as of course, a transcript of the record in this court, and thereupon, on notice to the opposite party, such interlocutory proceedings may be had therein as may be justified thereby (*d*).

(*a*) The subject of removals is covered by Act March 3, 1911, Sect. 28-39 inclusive. 36 Stat., 1094-1099. For the general practice with regard to same, see Donovan v. Wells Fargo & Co., 169 Fed., 363.

(*b*) A petition for removal did not formerly need to be verified, although it was considered the better practice to do so. Kansas City R. R. v. Daughtry, 138 U. S., 298, 303. Sweeney v. Coffin, 1 Dill., 73. Porter v. Northern Pacific R. R., 161 Fed., 773. Donovan v. Wells Fargo & Co., 169 Fed., 363. But by act of March 3, 1911, Sect. 29, 36 Stat., 1095, this is now required. For form of verification see 2 Loveland's Fed. Forms, 1275. A verification by an attorney on information and belief is sufficient. Porter v. Northern Pacific R. R., 161 Fed., 773. A bond capable of being enforced in case of a default is an essential prerequisite to a removal. Alexandria Nat'l Bank v. Willis C. Bates Co., 160 Fed., 839.

The amount of an attorney fee given by the state law in suits to enforce a miner's lien cannot be added to the amount of the lien, in order to make up the requisite jurisdictional amount for a removal. Swofford v. Cornucopia Mines, 140 Fed., 957.

Except where the removal is on the ground of local prejudice, it is too late to apply after the time fixed for filing a dilatory plea. First Nat. Bank v. Appleyard, 138 Fed., 939. Martin v. Balt. & Ohio R. R., 151 U. S., 673. Under the Pennsylvania practice it should also

be made before the time for filing an affidavit of defence. Muir v. Preferred Accident Ins. Co., 203 Pa., 338. Overholt v. German-American Ins. Co., 155 Fed., 488. But where the time for filing is extended by agreement, it extends the time to remove. Muir v. Preferred Accident Ins. Co., 203 Pa., 338. Sanderlin v. People's Bank, 140 Fed., 191. Russell v. Harriman Land Co., 145 Fed., 745. Tevis v. Palatine Ins. Co., 149 Fed., 560. Where the defendant is required to appear and plead within twenty days, the petition to remove is in time on the last day of the period, excluding the day from which it began to run. South Dakota Cent. R. R. v. Chicago, Michigan & St. Paul R. R., 141 Fed., 578. Where by amendment the plaintiff discloses for the first time a fact which justifies a removal, a petition to remove may be thereupon filed. Robinson v. Parker-Washington Co., 170 Fed., 850.

The right to remove on the ground that the case involves a question arising under the Constitution and laws of the United States must appear from the plaintiff's statement, and cannot be made out by the removal petition. Tenn. v. Union & Planters' Bank, 152 U. S., 454. Galveston R. R. v. Texas, 170 U. S., 226. Houston & Cent. R. R. v. Texas, 177 U. S., 566. Hall v. Chicago, Rock Island & Pacific R. R., 149 Fed., 564. Oregon v. Three Sisters Irr. Co., 158 Fed., 346. People's U. S. Bank v. Goodwin, 160 Fed., 727. Rural Home Tel. Co. v. Powers, 176 Fed., 986. Dale v. Smith, 182 Fed., 360. The existence of a separate controversy, entitling a single defendant to remove, must also appear on the face of the plaintiff's pleadings. Ches. & Ohio R. R. v. Dixon, 179 U. S., 131. A dismissal on the merits as to non-removable defendants, does not afford opportunity for a removal as to others who might have removed had they been sued alone. Lathrop, Shea & Henwood v. Interior Construction Co., 215 U. S., 246. The burden of proving a fraudulent joinder to prevent a removal is on the removing defendant. Stevenson v. Illinois Cent. R. R., 192 Fed., 956. There is a separate controversy as to different tracts of land joined together in condemnation proceedings. Deepwater Railway v. West. Pocahontas Coal Co., 152 Fed., 824.

(*c*) Removable Cases. Condemnation proceedings are removable. Boom Co. v. Paterson, 98 U. S., 403. Searl v. School district, 124 U. S., 197. Martin v. Balt. & Ohio R. R., 151 U. S., 673. Helena Power Co. v. Spratt, 146 Fed., 310. Kansas City v. Hennegan, 152 Fed., 249. Fishblatt v. Atlantic City, 174 Fed., 196. So also is an assessment proceeding for a municipal improvement. In re City of Chicago, 64 Fed., 897; or an appeal from the decision of the state engineer with regard to a water appropriation permit. Waha-Lewiston L. & W. Co. v. Lewiston Sweetwater Irr. Co., 158 Fed., 137. There is also a separable controversy which is removable, where the owners of different tracts of land are joined in one condemnation proceeding. Deepwater Railway v. West. Pocahontas Coal Co., 152 Fed., 824. And the land owner being the real defendant, he may remove into the Federal Court, if the proper conditions exist, however he is denominated by the state law. Mason City, &c., Railroad v. Boynton, 204 U. S., 570. Nor can the state defeat the right to remove by changing the form of the action. Wilson v. Smith, 66 Fed., 81. Metropolitan Water Co. v. Kansas City, 164 Fed., 738.

An action by an alien against a non-resident citizen is removable by the latter. Barlow v. Chicago & Northwestern R. R., 164 Fed., 765. Rones v. Katalla Co., 182 Fed., 946.

A case arising under the Federal law is removable where it involves the jurisdictional amount. Lewis Pub. Co. v. Wyman, 152 Fed., 200.

A garnishee proceeding after judgment against the defendant is removable by a non-resident garnishee, which the fact that the defendant is a citizen and resident of the same state will not defeat. Baker v. Duwamish Mill Co., 149 Fed., 612.

A corporation, although dissolved, may nevertheless remove where it is authorized to prosecute and defend suits notwithstanding the dissolution. Groom v. Mortimer Land Co., 192 Fed., 849.

NON-REMOVABLE CASES. A case under the Federal Employers' Liability Law is not removable upon any ground. Symonds v. St. Louis, &c., Railway, 192 Fed., 353. Strauser v. Chic., Burl. & Quincy R. R., 193 Fed., 293. Saiek v. Pennsylvania R. R., 193 Fed., 303. Lee v. Toledo, St. Louis & West. R. R., 193 Fed., 685. Ullrich v. New York, New Haven & Hartford R. R., 193 Fed., 768. But see Van Brimmer v. Texas & Pacific R. R., 190 Fed., 394.

That the defendant is a receiver appointed by a Federal Court does not make the case removable as one arising under the Federal law. Rural Home Telephone Co. v. Powers, 176 Fed., 986. Dale v. Smith, 182 Fed., 360. A case is not separable so as to permit of a removal where it is made up of several claims, as to one of which this is not true. Coram v. Davis, 182 Fed., 939. But there is a separate and distinct controversy, which is removable where owners of different tracts of land are joined in one condemnation proceeding. Deepwater Railway v. West Pocahontas Coal Co., 152 Fed., 824.

Pending actions will not be consolidated so as to make up the requisite jurisdictional amount to warrant a removal. Pearce Mfg. Co. v. Hartford Fire Ins. Co., 15 Dist. (Pa.), 645. A defendant cannot secure a removal by setting up a counter claim exceeding the jurisdictional amount where the plaintiff's claim is insufficient. Illinois Cent. R. R. v. Waller, 164 Fed., 358. The Federal Court cannot get jurisdiction by the removal of a case which was not within the jurisdiction of the state court. Darnell v. Illinois Cent. R. R., 190 Fed., 656.

An appeal from an assessment of taxes is not removable where the Court in respect to such proceedings is not a judicial body, but merely acts as a Board of Commissioners. Upshur Co. v. Rich, 135 U. S., 467. But where the appeal proceeds according to judicial methods, the right to remove would seem to exist. Ibid.

While condemnation proceedings are removable, a petition to railroad commissioners for leave to condemn is not. New York, &c., R. R. v. Cockcroft, 46 Fed., 881; nor proceedings to determine the right to condemnation and compensation. Hartford, &c., R. R. v. Montague, 94 Fed., 227.

(*d*) Where the case is removed on the ground of diverse citizenship alone, upon the filing of the petition and bond, if filed in time, the jurisdiction of the State Court ceases. Virginia v. Rives, 100 U. S., 313, 316. Mannington v. Hocking Valley R. R., 183 Fed., 133. But the State Court is not required to let go until a case is made out, which shows on its face that the removal is of right. The Removal Cases, 100 U. S., 457. And the Federal Court is not put in possession of the case until a transcript of the record has been filed, until which time everything is held in abeyance. Mahoney Mining Co. v. Bennett, 4 Sawy., 289. Delbanco v. Singletary, 40 Fed., 177.

By Act of March 3, 1911, Sect. 29, 36 Stat., 1095, except where the removal is on the ground of local prejudice, the removing party is required to file the record in the Federal Court within thirty days from the date of filing the petition, and must plead, answer or demur within thirty days thereafter. But it is competent for the court to receive the record in advance, which may be provided for by rule. Creagh v. Equitable Life Assur. Soc., 83 Fed., 849. And to take such action thereon, at the instance of either party, as may be necessary to preserve the rights involved. Arthur v. New Eng. Mut. Insurance Co., 6 W. N. C., 403. Consolidated Traction Co. v. Guarantors' Liability Co., 78 Fed., 657. In re Newark Traction Co., 110 Fed., 25. Such as the granting of a restraining order. Mahoney Mining Co. v. Bennett, 4 Sawy., 289; the appointment of a receiver. Commercial Bank v. Corbett, 5 Sawy., 172; the modification of an injunction. Portland v. Oregonian R. R., 6 Fed., 321; the dissolution of an injunction and vacating of a receivership. Texas &c. R. R. v. Rust, 17 Fed., 275; the hearing of a motion to remand. Hartford &c. R. R. v. Montague, 94 Fed., 227; Deblanco v. Singletary, 40 Fed., 177. Mills v. Newell, 41 Fed., 529; Thompson v. Chicago &c. R. R., 60 Fed., 773. Anderson v. Appleton, 32 Fed., 857. New Jersey v. Corrigan, 139 Fed., 758. Harrington v. Great North. R. R., 169 Fed., 714. (*Contra,* as to motion to remand. Kansas City R. R. v. Interstate Lumber Co., 36 Fed., 9. Frink v. Blackinton, 80 Fed., 306); or fixing the time for the appointment of commissioners in condemnation proceedings. In re Newark Traction Co., 110 Fed., 25. (*Contra,* in re Barnesville R. R., 4 Fed., 10). The interlocutory proceedings, however, must not be such as would determine the whole merits of the controversy; or for which there is no need of haste. Thus while depositions de bene esse may be taken. Kansas City R. R. v. Interstate Lumber Co., 36 Fed., 9, 11; a commission to take depositions generally should not be granted. North American Transportation Co. v. Howells, 121 Fed., 694; although where the removing party joins in the execution of the commission, as by securing the appointment of a special commissioner, he will be bound. Zych v. American Car & Foundry Co., 127 Fed., 723. Nor should a preliminary injunction, necessary to preserve a franchise, pending the consideration of its exclusive character, be dissolved. New Orleans City R. R. v. Crescent City R. R., 5 Fed., 160; nor one which was granted to stay a sale on a mortgage. Hamilton v. Fowler, 83 Fed., 321; nor can judgment be taken for want of an appearance and plea before the time for filing, on a rule pending at the time of the removal. Torrent v. Martin Lumber Co., 37 Fed., 727. This is regulated in this Court by Rule 86, infra. *Cf.* Bryce v. Southern R. R., 129 Fed., 966. Pelzer Mfg. Co. v. St. Paul, 40 Fed., 185.

A removal by the defendant does not prevent him from challenging the jurisdiction of either the state or the federal court over him. Mechanical Appliance Co. v. Castleman, 215 U. S., 437. Davis v. Cleveland &c. R. R., 146 Fed., 403. North West. Bank v. Silberman, 154 Fed., 809; nor is he estopped from removing by a motion made in the State Court to set aside the service before removal. Johnson v. Computing Scale Co., 139 Fed., 339. Whether a motion to set aside the service of summons may be renewed, after a removal, where it has been disposed of by the State Court adversely, is in doubt. Guernsey v. Cross, 153 Fed., 827. Hoyt v. Ogden Portland Cement Co., 185 Fed., 889. *Cf.* Lathrop v. Interior Construction Co., 150 Fed., 666. Flint v. Coffin, 176 Fed., 872.

Rule 84. Where a case is removed from a state court on the ground of local prejudice (*a*), a copy of the order of this court directing the removal shall be forthwith filed with the state court, and a transcript of the record be taken and filed with the clerk here (*b*).

(*a*) Local prejudice is not a separate ground of removal. Cochran v. Montgomery, 199 U. S., 260; it only operates to extend the time. The requisite diversity of citizenship must also exist. Cleveland v. Cleveland R. R., 147 Fed., 171.

(*b*) This is the course prescribed in Pennsylvania Co. v. Bender, 148 U. S., 255, 259; and may properly be provided for by rule. Creagh v. Equitable Life Assur. Soc., 83 Fed., 849. A removal of this character must be moved for, on or before the term at which the case could be first tried, and before the trial of it. Parker v. Vanderbilt, 136 Fed., 246. It is too late, after a mistrial. Farmers Bank v. Schuster, 86 Fed., 161. The opposite party is entitled to be heard before an order of removal on the ground of local prejudice is made. Schwenk v. Strang, 59 Fed., 209. Ellison v. Louis. & Nash. R. R., 112 Fed., 805. If uncontroverted the petition may be taken as prima facie sufficient. In re Pennsylvania Co., 137 U. S., 451. For form of petition, see 2 Loveland Fed. Forms, Nos. 1284, 1285; and for order staying proceedings in the state court, and for a certiorari to remove the record, see Ibid, Nos. 1289 & 1297.

Rule 85. A motion to remand (*a*) a case to the state court shall be made within ten days (*b*) after a transcript of the record has been filed in this court and notice thereof given, and before the party moving to remand has taken any further step therein (*c*).

[West. (Pa.), Dist., Rule 29.]

(*a*) A motion to remand may be made immediately upon the filing of the transcript. Harrington v. Great Northern Railroad, 169 Fed., 714. It is for the Federal and not the State Court to determine, whether the case has been properly removed. Ches. & Ohio R. R. v. McCabe, 213 U. S., 207. Shane v. Butte Electric Railroad, 150 Fed., 801. Barlow v. Chicago & Northwestern R. R., 164 Fed., 765. The refusal of the State Court to allow a removal does not therefore affect the jurisdiction of the Federal Court. Atlantic Coast Line v. Bailey, 151 Fed., 891. And notwithstanding the refusal of the State Court to recognize the removal, the Federal Court may enjoin further proceedings there. Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S., 239. Mutual Life Ins. Co. v. Langley, 145 Fed., 415.

Even after an order of remand, it may result from subsequent pleadings, or the conduct of the parties, that the cause is removable, in which case a second application to remove may be made. Fritzlen v. Boatmen's Bank, 212 U. S., 364.

It is not material that the plaintiffs are citizens of different states from each other, so that none of them are the same as that of the defendant. Sweeney v. Carter Oil Co., 199 U. S., 252. An allegation of residence in a removal petition is not the equivalent of an allegation of citizenship of a particular state, so as to make out the diversity

of citizenship on which the right to remove depends. Harding v. Standard Oil Co., 182 Fed., 421.

A case cannot be removed where neither the plaintiff nor defendant is a resident of the district. Ex parte Wisner, 203 U. S., 449. Yellow Astor Mining Co. v. Crane Co., 150 Fed., 580. Southern Pacific R. R. v. Burch, 152 Fed., 168. But objections to the Court's jurisdiction upon this ground may be waived; which is done by a general appearance. Corwin Mfg. Co. v. Henrici Washer Co., 151 Fed., 938; or by whatever is equivalent thereto, as by the entry of a general demurrer, calling for a ruling on the merits. Western Loan Co. v. Butte Mining Co., 210 U. S., 368. Peale v. Marian Coal Co., 172 Fed., 639. But the defendant cannot improve his position after a motion to remand for want of jurisdiction by entering a general appearance. Tierney v. Helvetia Fire Ins. Co., 163 Fed., 82. Where the case has been removed by the defendant on the ground of diversity of citizenship, he cannot have it remanded because it develops at the trial that the plaintiff is an alien. Rones v. Katalla Co., 182 Fed., 946. Nor can the plaintiff amend so as to state a new or different cause of action, for which the defendant could not have originally been sued in that jurisdiction. Western Wheeled Scraper Co. v. Gahagan, 152 Fed., 648.

(*b*) The objection that the removal was taken too late may be waived, if not made in time. Martin v. Baltimore & Ohio R. R., 151 U. S., 687.

(*c*) A petition to remove may be amended to cure a defective allegation of citizenship, if moved for before action taken to remand. Kinney v. Col. Sav. Assoc., 191 U. S., 78. Wilbur v. Red Jacket Coal Co., 153 Fed., 662. De La Montanya v. De La Montanya, 158 Fed., 117. But an amendment assigning new grounds cannot be made. Shane v. Butte Electric Railway, 150 Fed., 801. It is only where there is a defective or informal statement of facts that an amendment is allowable; not where there is an entire absence of essentials. Santa Clara Co. v. Goldby Machine Co., 159 Fed., 750.

Where the jurisdictional amount is denied on a motion to remand, the defendant is put to the proof of it. Wetmore v. Rymer, 169 U. S., 115. Davies v. Wells, 134 Fed., 139. Order of Railroad Telegraphers v. Louisville & Nashville R. R., 148 Fed., 437. New Castle v. Western Union Tel. Co., 152 Fed., 569. But the plaintiff cannot defeat a removal by an offer to reduce his claim. Johnson v. Computing Scale Co., 139 Fed., 339. Donovan v. Dixieland Amusement Co., 152 Fed., 661.

On remand to the State Court, a docket fee of $10. is taxable. Riser v. Southern Railway, 116 Fed., 1014. Acker v. Charleston & West Carolina R. R., 190 Fed., 288.

Rule 86. Where at the time a cause is removed from a state court, a rule to do any act or to file any pleadings is pending (*a*), the party against whom the rule was taken shall be entitled to ten days after the transcript of the record has been filed in this court and notice of such filing given, in which to comply therewith (*b*), not less however in any event than the time to which he would have been entitled if there had been no removal (*c*).

[West. (Pa.), Dist., Rule 29.]

(*a*) The Federal Court takes the case in the condition it was in at the time of the removal. Act March 3, 1911, Sects. 36 & 38. 36 Stat., 1098. 18 Encycl. Plead. & Prac., 357. Lebensberger v. Scofield, 139 Fed., 380. Preston v. McNeil Lumber Co., 143 Fed., 555. And may therefore permit an amendment of process or pleadings to the extent permissible under the state law, provided it does not offend against the Federal Law. Stone v. Speare, 175 Fed., 584; or may hear and pass upon a pending motion to modify or vacate a restraining order or preliminary injunction. Mannington v. Hocking Valley R. R., 183 Fed., 133; or to dissolve an attachment. Lebensberger v. Scofield, 139 Fed., 380. As to whether a motion to set aside the service of summons may be renewed after a removal, even though decided adversely to the defendant by the state court, see Lathrop, Shea & Henwood v. Interior Construction Co., 150 Fed., 666. Flint v. Coffin, 176 Fed., 872. *Contra.* Guernsey v. Cross, 153 Fed., 827. Hoyt v. Ogden Portland Cement Co., 185 Fed., 889.

(*b*) The removal suspends the running of a pending rule, until the record is filed in the federal court, but does not enlarge the time for complying with the rule further than that. Torrent v. Martin Lumber Co., 37 Fed., 727. Bryce v. Southern R. R., 129 Fed., 966. But this may be regulated by standing order. Pelzer Mfg. Co. v. St. Paul, 40 Fed., 185. Bryce v. Southern R. R., 129 Fed., 966.

(*c*) Where an order of removal is rescinded by the state court, as improvidently granted, the defendant has a right to notice, and a reasonable time to comply with a pending rule. Muir v. Ins. Co., 203 Pa., 338.

TERMS AND RETURN DAYS.

Rule 87. The terms of Court shall be as they may be fixed from time to time by Act of Congress; but the Court shall be open every day, Sundays and legal holidays excepted, for motions, orders, and such other business as may be transacted without a jury.

By Act of Congress of June 30, 1902, 32 Stat., p. 549, terms of court are to be held at Williamsport on the second Monday of January and June; at Scranton on the fourth Monday of February and the third Monday of October; and at Harrisburg on the first Monday of May and of December in each year.

Rule 88. Every writ shall bear date on the day that it is issued (*a*), and shall be made returnable (*b*) on the first day of the next succeeding term; provided, that in case of a summons, if there shall not be ten days intervening before the next term (*c*), it shall be made returnable on the first day of the second succeeding term; and provided further, that the first Monday of August and the first Monday of September shall be additional return days to which all writs immediately preceding each of them shall be made returnable, as though it was the first day of a term.

[East. (Pa.), Dist., Rule 25. West. Dist. Rule 25. In both of these districts, the first Monday of each month is made a return day.]

(*a*) A summons cannot be issued on the return day and made returnable the same day. Dyott v. Pennock, 2 M., 213. But it may be served on the return day. Herberton v. Stockton, 2 M., 164. Boyd v. Serrill, 2 Clark, 327.

(*b*) A Federal Court may regulate how its writs shall be returnable, and does not have to conform to the State practice. Shepard v. Adams, 168 U. S., 618. Bost. & Maine R. R. v. Gokey, 210 U. S., 155. Kinney v. U. S. Fidelity & Guaranty Co., 182 Fed., 1005.

(*c*) A summons may be issued within ten days of the next return day, if the defendant be given ten days after service in which to appear. Fisher v. Potter, 2 M., 147. But at least ten days must intervene between the issue and the return day. Hatfield v. Swiler, 28 Pa., 522. Judgment for want of an appearance without ten days' service is bad. Fitzsimons v. Salomon, 2 Binn., 436.

TRIALS AND TRIAL LISTS.

Rule 89. Every case shall be tried at the place in the district appointed for the holding of Court, which is nearest to the defendant's residence, unless counsel shall agree, or the court shall order otherwise.

By Act March 3, 1911, Sect. 103, 36 Stat., 1123; civil suits instituted at Harrisburg shall be tried there, "if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial."

Rule 90. The trial list shall be made up by the clerk thirty days before the beginning of each term, and all cases at issue shall be placed thereon in the order of their age, notice thereof being forthwith given to counsel. Other cases may be added as of course, at any time, by agreement of the parties; or may be ordered on, by the court, on notice to the parties, not less however as to any case than twenty days before the time when it will be called for trial.

[East. Dist. (Pa.), Rule 28, Sects. 1, 2 and 3. West. Dist., Rule 31.]

Rule 91. Every application for a continuance, upon the ground of the absence of a material witness, shall be accompanied by the affidavit of the party applying therefor, setting forth the facts which he expects to prove by such witness, and the efforts made to procure his attendance. And if it be admitted by the opposite party that the witness, if called,

would testify, as set forth in the affidavit, the court, in its discretion, may refuse the application.

[East. Dist. (Pa,). Rule 27, Sect. 4.]

Rule 92. No case regularly on the trial list shall be continued by agreement of the parties unless the court consents thereto.

Rule 93. The entire examination of a witness shall be conducted by one only of the counsel, on either side.

Rule 94. The party calling a witness, when required by the court (*a*), shall state briefly what is proposed to be proved by his testimony, and the legal purpose of it (*b*).

(*a*) It is within the discretion of the Court to refuse to permit a formal offer of testimony, where a similar offer has already been made and ruled upon. Sprague v. Reilly, 34 Pa. Sup. Ct., 332.

(*b*) Where the materiality of an offer of evidence is not apparent, the party may be required to state the purpose. Morgan v. United States, 169 Fed., 242.

Rule 95. On the trial of a cause, counsel for the party having the affirmative of the issue on the pleadings, shall open the case (*a*), and at the conclusion of the evidence, shall first address the jury, and be followed by counsel for the opposite party; counsel making the first address having the right to reply and being confined to the points made by his opponent (*b*).

In criminal cases, other than capital, where the defendant offers no evidence, his counsel shall have the closing address to the jury.

[East. Dist. (Pa.), Rule 27, Sect. 1.]

(*a*) Where the plaintiff fails to appear at the trial, a non-suit should be entered. It is error to take a verdict for defendant. Patting v. Spring Valley Coal Co., 98 Fed., 811. Felts v. D. L. & W. R. R., 170 Pa., 432. Crumley v. Lutz, 180 Pa., 476.

If it is evident on the opening of counsel, that the plaintiff has no case, or the defendant has no defence to the case made out by the plaintiff, the Court may direct a verdict accordingly, without taking testimony. Oscanyan v. Arms, 103 U. S., 261. Butler v. National Home, 144 U. S., 64. The Court may also summarily dismiss a case which is clearly frivolous and vexatious. O'Connell v. Mason, 132 Fed., 245. Cornue v. Ingersoll, 174 Fed., 666.

(*b*) This is declared to be the correct practice. Blight v. Ashley, 1 Pet., C. C., 20 n. In ejectment the plaintiff is always entitled to begin and conclude. McCausland v. McCausland, 1 Yeates, 304. Von Storch v. Von Storch, 196 Pa., 545.

Rule 96. Points upon which the Court is requested to charge the jury, shall be so framed that they can be answered by simply affirming or denying them (*a*). They shall be submitted in writing, and a copy furnished to the opposing counsel, before the argument to the jury has been begun (*b*).

(*a*) A party is entitled to a distinct answer responsive to his points, if they are properly drawn, present questions that fairly arise in the case, and can be answered by a simply affirmance or refusal. Whitmire v. Montgomery, 165 Pa., 253, 261. The last clause of a point, that the verdict should be for the plaintiff or defendant, according to the party presenting it, is a very common and a very dangerous addition, which often prevents an affirmance where the law stated in the point is otherwise unobjectionable. Widdall v. Garsed, 125 Pa., 358, 361. Keiper v. Equitable Life Assur. Soc., 159 Fed., 206. It is not for the Court to reform requests and throw out objectionable parts. Exchange Bank v. Moss, 149 Fed., 340. A motion for a directed verdict is too general unless the attention of the Court is called to the ground on which it is predicated. Choctaw, Okla., & Gulf R. R. v. Jackson, 192 Fed., 792. Where both parties ask for binding instruction without more, they both affirm that there are no disputed facts, and the judgment is therefore conclusive, if there is any evidence to sustain it. Beuttell v. Magone, 157 U. S., 154. Bankers' Mutual Casualty Co. v. State Bank, 150 Fed., 78. Pensacola Bank v. Merchants' & Farmers' Bank, 180 Fed., 504. Melton v. Pensacola Bank, 190 Fed., 126. But not so, where other instructions are asked in case binding instructions are denied. Empire Cattle Co. v. Atch., Topeka & Santa Fe R. R., 210 U. S., 1. Minahan v. Grand Trunk Railway, 138 Fed., 37. McCormick v. National City Bank, 142 Fed., 132, 133. Charlotte National Bank v. Southern R. R., 179 Fed., 769. Pensacola Bank v. Merchants' & Farmers' Bank, 180 Fed., 504. Farmers' & Merchants' Bank v. Maines, 183 Fed., 37.

(*b*) A party cannot complain that the opportunity to present points is not left open indefinitely. Astruc v. Star Co., 182 Fed., 705. The court may therefore refuse to consider requests not presented until after argument, in disregard of the rule. Atch., Topeka & St. Fe R. R. v. Hamble, 177 Fed., 644; and particularly an oral request not made until after the charge is completed and the jury is about to retire. Keystone Bank v. Safety Banking Co., 179 Fed., 727.

The plaintiff has the right to take a voluntary non-suit, even after an announcement of the opinion of the Court, on motion for a directed verdict. Meyer v. National Biscuit Co., 168 Fed., 906.

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BANKRUPTCY RULES

OF THE

District Court of the United States

FOR THE

Middle District of Pennsylvania

With Notes

Rule 1. Accounts of receivers shall be filed with the clerk, and shall be confirmed nisi when filed, and notice in writing shall forthwith be mailed by the clerk to all creditors at their respective addresses, that, unless excepted to within ten days, they will be confirmed finally. If exceptions are filed, they shall be heard and disposed of by the Court, or may be referred to the referee to take the evidence and make report thereon, or, the Court, without any formal exceptions, may revise and correct such accounts if deemed necessary. If no exceptions are filed within the time specified, or there is no ground for correcting such accounts, they shall be confirmed finally.

Rule 2. Accounts of trustees, whether excepted to or not, after having been finally disposed of by the referee, shall be forwarded to the clerk for examination and final confirmation by the Court.

APPRAISEMENTS (*a*).

Rule 3. Where an appraisement has been made at the instance of a receiver, there shall be no other or further appraisement by the trustee, except on motion and order of Court, for cause shown (*b*).

(*a*) An appraisement should be general rather than special, only such particularity being indulged in as will be sufficient to reasonably identify the property, in character and quantity, and give a fair idea of its value. It is not to descend to the minutiæ of a merchant taking stock. In re Gordon Supply Co., 13 A. B. R., 352. 133 Fed., 798. The purpose of an appraisement is simply to get a general idea of the extent of the estate, so as to charge the party in whose custody it is with its value, and enable all concerned the better to keep track of it. Incidentally it may serve as a guide to bidders, but it is not to be undertaken with that in view. In re Kyte, 19 A. B. R., 768, 158 Fed., 121. On a sale of the property, it is not necessarily a measure of adequacy. In re Zehner, 27 A. B. R., 536. 193 Fed., 787. A per diem fee of five dollars ($5.00) is all that will be allowed to appraisers in this district, and it must be an extraordinary case where over two or three days are required. If there is occasion for anything more than this, the trustee must justify it. In re Fidler, 23 A. B. R., 16. 172 Fed., 632. It is against public policy that an appraiser should buy the property appraised. In re Frazin & Oppenheim, 24 A. B. R., 598. 174 Fed., 713.

(*b*) There is no warrant for a second appraisement simply because the trustee thought the figures of the first were too low. In re Kyte, 19 A. B. R., 768. 158 Fed., 121.

ATTORNEYS.

Rule 4. The attorney for the petitioning creditors shall be deemed to be the attorney for the estate until a trustee is appointed and qualified. Upon the qualification of the trustee, he shall have the right, with the approval of the referee, to make a new selection.

Services rendered for petitioning creditors are not to be confused with those for the estate, nor be made the subject of a claim against the trustee. In re Oppenheimer, 17 A. B. R., 59. 146 Fed., 140. In re Hill Co., 20 A. B. R., 73. 159 Fed., 73.

Counsel are not debarred from acting for the trustee because of having acted for the bankrupt. In re Dimm, 17 A. B. R., 119. 146 Fed., 402. But in most cases it is not best. In re Strobel, 20 A. B. R., 22. 160 Fed., 916.

Ordinarily the duties of a receiver do not justify the employment of an attorney. In re Hill Co., 20 A. B. R., 73. 159 Fed., 73. But there may be occasions where he is entitled to assistance, in which case a suitable allowance will be made. In re Oppenheimer, 17 A. B. R., 59. 146 Fed., 140.

There is no direct provision in the Bankruptcy Act for payment of attorneys employed by the trustee. It only comes in as a part of

the administration expenses. In re Stotts, 1 A. B. R., 641. In re Byerly, 12 A. B. R., 186. 128 Fed., 637.

Attorney fees are only allowable where the attorney has acted directly for the estate and it has been benefited thereby. In re Ketterer Mfg. Co., 19 A. B. R., 646. 155 Fed., 987.

Rule 5. An attorney fee of fifty dollars ($50.00) shall be allowed to the petitioning creditors (*a*) in involuntary cases; and to the bankrupt in voluntary cases (*b*); and the same amount to the bankrupt in involuntary cases, for the assistance of counsel in performing the duties required by the statute (*c*). No other or further fee shall be allowed in either instance, except by order of the court or referee for cause shown (*d*).

(*a*) Creditors are not to be allowed attorney fees for the services of counsel in contesting improper claims, setting aside asserted priorities, or securing the appointment of a suitable trustee. In re Medina Quarry Co., 191 Fed., 815. 27 Amer. Bank. Rep., 466.

(*b*) The allowance of an attorney fee to a voluntary bankrupt is intended to cover the preparation of the petition and schedules and the petition for a discharge. Matter of Hitchcock, 17 A. B. R., 664.

(*c*) And to an involuntary bankrupt, for professional services rendered to the bankrupt in performing the duties enjoined upon him by the act. In re Woodard, 2 A. B. R., 692. 95 Fed., 955. In re Payne, 18 A. B. R., 192. 151 Fed., 1,018.

(*d*) But clerical work in posting the bankrupt's books preparatory to making up his schedules is not included. In re Connell & Sons, 9 A. B. R., 474. 120 Fed., 846. Nor attendance at hearings before the referee with respect to the allowance of claims. Ohio Valley Bank v. Mack, 20 A. B. R., 919. 163 Fed., 155. Nor services in obtaining a discharge. In re Brundin, 7 A. B. R., 296. 112 Fed., 306. Or endeavoring to establish his exemption claim. In re Castleberry, 16 A. B. R., 430. 143 Fed., 1,018. In re O'Hara, 21 A. B. R., 508. 166 Fed., 384. Nor services or disbursements upon a contested composition. In re Fogarty, 26 A. B. R., 568. 187 Fed., 773. And much less, services in resisting the trustee's efforts to recover goods concealed. In re Felson, 15 A. B. R., 185. 139 Fed., 275.

Rule 6. Where no trustee is appointed, the fee of five dollars ($5.00) deposited with the clerk at the time the petition was filed, for the benefit of the trustee, shall be returned to the attorney who filed the petition, upon a certificate from the referee that the case has been closed.

COMPOSITIONS.

Rule 7. Where a composition is offered [after adjudication] (*a*) and application is made for the confirmation of the same (*b*), the bankrupt shall file with such application the acceptance in writing of a majority in number and amount of his creditors, together with a certified check or draft for the money necessary to carry out the composition, including the payment of costs and the percentage due to the clerk for receiving and disbursing the money. And thereupon a rule shall be entered upon the creditors to show cause against the composition, returnable before the referee in charge of the case, on a day fixed, not less than ten days (*c*) thereafter, of which notice shall forthwith be given, by the referee, by mail to all creditors (*d*), and by publication in the newspaper designated by the Court for the county in which the case arose at least one week prior to the day fixed for the hearing. And if no appearance in opposition thereto is entered at that time (*e*), and it be found that a majority of creditors in number and amount have agreed to it, the composition shall be confirmed finally; and the referee shall make report thereof, and therewith exhibit a list of the creditors with their addresses, and the amounts respectively due to each upon the composition; for which the clerk shall forthwith draw checks and mail them to such creditors as have proved their claims, retaining one per cent. of the amount so received and paid out.

But if the composition is opposed, the creditor or creditors objecting thereto shall file with the referee a specification (*f*) of his or their objections within ten days after appearing, unless the time is enlarged by the Court for cause shown. And such objections shall thereupon be certified to the Court, to be disposed of according to law (*g*).

(*a*) By act of June 25, 1910, Sec. 5, 36 Stat., 839, a composition may be offered either before or after adjudication. Previous to this, it could only be offered afterwards. Bankruptcy Act, Sec. 12 a. For compositions before adjudication, see next rule.

(*b*) Application for the approval of a composition must be heard and decided by the Judge and not by the referee. Gen'l Order XII, 3. In re Bloodworth-Stembridge Co., 24 A. B. R., 156. 178 Fed., 372. But the Court may refer the case to the referee as special master to hear and make report thereon. In re McDuff, 4 A. B. R., 110. 101 Fed., 241. In re Rauchenplat, 9 A. B. R., 763.

(*c*) Ten days' notice to creditors is imperative. Bankruptcy Act, Sec. 58, a (2).

(*d*) Claims which have not been proved within a year after adjudication have no standing in composition proceedings, and the bankrupt has the right to appear in opposition to such claims. In re French, 25 A. B. R., 77. 181 Fed., 583. *Cf.* In re Wilkens, 191 Fed., 94. Nor is an unschedule claim, not filed until after the notices to creditors have gone out, entitled to come in on the composition fund with other creditors, even though such creditor has the right to hold up the proceedings until a new deposit for his benefit is made. In re Ennis & Stoppani, 25 A. B. R., 383. And this is true even where the claim appears in the schedules, and the deposit made by the bankrupt is sufficient to cover it. In re Blond, 188 Fed., 452.

(*e*) A creditor, if he desires to oppose a composition, must enter his appearance on the day when parties are required to appear, and file a specification of his objections within ten days afterwards, unless the time is specially enlarged. Gen'l Order, XXXII. This order is mandatory, and must be strictly observed. In re Grant, 14 A. B. R., 398. 135 Fed., 889.

(*f*) The specifications should have the same particularity as those required in opposition to a discharge. City National Bank v. Doolittle, 5 A. B. R., 736. 107 Fed., 236. Alder v. Jones, 6 A. B. R., 245. 109 Fed., 967.

(*g*) The approval of a composition by a majority of creditors is prima facie proof that the offer is adequate. In re Hoxie, 25 A. B. R., 32. 180 Fed., 508.

Rule 7 a. Where a bankrupt offers terms of composition before adjudication, the offer, unless otherwise ordered, shall forthwith be referred to the referee in whose district it arises, who shall call a meeting of creditors for the allowance of claims, examination of the bankrupt, and preservation or conduct of the estate, at which meeting the referee shall preside; and if the terms of the composition shall be accepted by a majority in number and amount of the creditors whose claims are filed and allowed at such meeting, an application for the confirmation of the composition may forthwith be filed with the referee, and upon the delivery to the referee of a certified check, drawn to the order of the clerk of the Court, for the amount necessary to carry out the composition, including the payment of costs, and the percentage due to the clerk for receiving and disbursing the money, a rule shall be entered upon creditors to show cause against the composition, returnable before the referee, of which due notice shall be given, and the composition be proceeded with, the same as in other cases.

DISCHARGE.

Rule 8. Applications for a discharge (*a*) shall be by petition in the prescribed form, and shall be signed with the full name of the petitioner, and be accompanied by a certificate from the referee that the bankrupt has been examined by his creditors, or has duly submitted himself for examination; and also by a certified list of the creditors who have proved their claims, or that no claims have been proved, where that is the case. And the Court (*b*) shall thereupon enter an order, fixing the time at which creditors and others interested shall appear and show cause against the discharge, of which the clerk shall forthwith give notice by publication in the newspaper of the district designated for the purpose, and by mailing notice of the petition and order to all known creditors (*c*). If no appearance in opposition thereto be entered at the time fixed (*d*), the discharge shall be granted, or, if the discharge is opposed, the party objecting (*e*) thereto shall specify and file the grounds of his objection (*f*), which shall be certified to the referee, as special master to take the testimony and make report (*g*).

(*a*) Gen'l Order XII, 3, with regard to applications for discharge, is mandatory and must be strictly complied with. In re Albrecht, 5 A. B. R., 223, 104 Fed., 974. An application for a discharge must be filed with the clerk, and not with the referee. In re Taylor, 26 A. B. R., 143. 188 Fed., 479.

(*b*) The Court and not the referee must fix the time for the hearing. In re Johnson, 19 A. B. R., 814. 158 Fed., 342. A referee has no jurisdiction to hear an application for a discharge except as it is referred to him specially. In re Taylor, 26 A. B. R., 143. 188 Fed., 479.

(*c*) Before incurring the expense of sending out notices, the clerk may require the bankrupt to indemnify him. Gen'l Order X. But money advanced for this purpose must be repaid to the bankrupt out of the estate as part of the administration expenses. In re Hatcher, 16 A. B. R., 722. 145 Fed., 658. Fees to the bankrupt's attorney for obtaining his discharge should not be charged against objecting creditors, even though they may be allowable out of the estate of the bankrupt. In re Gillardon, 26 A. B. R., 103. 187 Fed., 289. The costs incurred in opposing the discharge of a bankrupt, even where the discharge is refused will not be taxed against the estate. In re Kyte, 26 A. B. R., 507. 189 Fed., 531. A creditor may prosecute objections in forma pauperis. In re Guilbert, 18 A. B. R., 830. 154 Fed., 676.

(*d*) As to the manner in which objections to a discharge should proceed, see In re Daugherty, 26 A. B. R., 550. 189 Fed., 239. An appearance must be entered on or before the day when creditors are required to show cause, and a failure to do so precludes them from appearing and filing objections afterwards. In re Ginsburg, 12 A. B. R., 459. 130 Fed., 627. In re Grant, 14 A. B. R., 398. 135 Fed., 889. But

they have the entire day, and are not barred by failure to appear at a certain hour. In re Barrager, 27 A. B. R., 366. 191 Fed., 247. And the filing of objections before the return day is equivalent to an appearance. Groom v. Mortimer, Land Co., 192 Fed., 849. Unless the time is enlarged by the court the objections to the discharge must be filed within ten days thereafter. In re Albrecht, 5 A. B. R., 223. 104 Fed., 974. Nor can new grounds of objection be brought in after the ten days have expired. In re Johnson, 192, Fed., 356. 27 A. B. R., 644. It will be presumed on appeal that an appearance was duly entered within the ten days where no objection was made on that ground in the Court below. Shaffer v. Koblegard Co., 24 A. B. R., 898. 183 Fed., 71.

(*e*) If so authorized by creditors, the trustee may file objections. Act May 25, 1910, Sect. 6, 36 Stat., 838. *Cf.* In re Levey, 13 A. B. R., 312. 133 Fed., 572.

(*f*) An objection based on the alleged fraudulent failure to keep books is sufficient if framed in the words of the act. In re Magen Bros., 192 Fed., 883. 27 A. B. R., 729.

(*g*) The court may avail itself of the services of a master. In re Gillardon, 26 A. B. R., 103. 187 Fed., 289. The evidence in opposition to a discharge must be convincing, but does not need to be so beyond a reasonable doubt. Garry v. Jefferson Bank, 26 A. B. R., 511. 186 Fed., 461. The concealment of assets, as an objection to a discharge, must be clearly proved. In re Taylor, 26 A. B. R., 143. 188 Fed., 479.

Rule 9. When no application for a discharge has been made within a year (*a*) after the adjudication, the bankrupt, in order to get an extension, shall set forth by petition the reason why application was not sooner made, and if sufficient appears prima facie to excuse the delay the petition shall be set down for a hearing (*b*), not less than ten days thereafter, of which notice (*c*) by mail shall be forthwith given by the clerk to all creditors, who shall be required to appear and show cause, at the time fixed, if they desire to oppose the same. And if no such cause is shown (*d*), the bankrupt shall be allowed to make application within such further time as may be fixed by the Court, which application shall be by petition in the ordinary form, and be proceeded with as if made at the regular time.

(*a*) When no application is made within a year and six months after the adjudication, the Court has no jurisdiction afterwards to grant a discharge. In re Wagner, 15 A. B. R., 100. 139 Fed., 87.

(*b*) The bankrupt must sustain his petition at the hearing with satisfactory evidence or it will be dismissed. In re Glickman, 21 A. B. R., 171. 164 Fed., 209. And he must show that he was unavoidably prevented from applying for a discharge for the whole period, during which the application should have been made. In re Harris & Algor, 15 A. B. R., 705.

(*c*) Notice to creditors of an application by the bankrupt for an extension of time within which to petition for a discharge is held to be unnecessary in some jurisdictions. In re Fritz, 23 A. B. R., 84. 173 Fed., 560. But the practice has been different in this district and is now established by the present rule.

(*d*) Where notice has been given and an opportunity had to show cause against the extension asked for, creditors will be confined thereafter to the statutory objections, and cannot reopen the question of the right to an extension. In re Haynes & Sons, 10 A. B. R., 13. 122 Fed., 560. If the extension was granted for insufficient reasons, the remedy is to move to vacate it. Ibid.

Rule 10. Upon the granting of a discharge in any case, the clerk shall issue to the bankrupt, in evidence thereof, a certified copy of the order, under the hand and seal of the Court, for which he shall be entitled to receive a fee of one dollar ($1.00).

Bank. Act, Sect. 21 f. Official Form No. 59.

DISMISSAL OF PROCEEDINGS.

Rule 11. Upon application being made to dismiss the proceedings, for cause shown, a time shall be fixed for hearing the same not less than ten days thereafter, of which due notice (*a*) by mail shall forthwith be given by the clerk to all creditors, according to the list, with their addresses, furnished under oath by the bankrupt. And a similar notice shall be given before any petition is dismissed for want of prosecution or by consent of the parties.

(*a*) Notice to creditors of the proposed dismissal of proceedings is enjoined by the amendment of 1910. Act June 25, 1910, Sects. 9½ and 10. 36 Stat., 841. Before this the decisions were conflicting, notice being held necessary in In re Plymouth Cordage Co., 13 A. B. R., 665; 135 Fed., 1000; and not necessary, where there was no suggestion of collusion, in In re Levi, 15 A. B. R., 294. 142 Fed., 962.

EXEMPTIONS (*a*).

Rule 12. Where the sale of the goods of a bankrupt by a receiver or the marshal has been ordered before the bankrupt has had opportunity to claim or have set off to him the exemption allowed by law, he may petition the Court to have such goods as he desires to so claim set aside (*b*) and not sold (*c*), to await the establishment of his right, by virtue of his exemption, thereto.

(*a*) The Bankruptcy Court is expressly vested with jurisdiction to determine all claims of bankrupts to their exemptions, and may itself set them off where no trustee has been appointed. Smalley v. Langenour, 196 U. S., 93, 97. Exemptions depend for their allowance on the state law, but the manner of claiming them, and the proceedings to set them apart is regulated by the bankruptcy act. In re Gerber, 26 A. B. R., 608. 186 Fed., 693. The rules and forms prescribed by the Supreme

Court have the force and effect of law. And when therefore the bankrupt has failed to claim his exemption in the manner and at the time prescribed by Gen'l Orders XVII and XXXVIII, and Form 47, the right to it is waived. Ibid.

(*b*) On petition of the bankrupt, the Court will direct a receiver to set aside specific property which the bankrupt wishes to exempt to await the result of his exemption claim. In re Joyce, 11 A. B. R., 716. And the delivery of the property to the bankrupt may be directed on his giving security for its return in the event that his claim is not sustained. In re Shaffer & Son, 11 A. B. R., 717.

(*c*) Where goods of the bankrupt have been sold by a receiver before he has had time to make claim to specific articles, he is entitled to his exemption out of the proceeds of the sale. In re LeVay, 11 A. B. R., 114. 125 Fed., 990. In re Stein, 12 A. B. R., 384. 130 Fed., 377; affirmed 14 A. B. R., 30. 134 Fed., 235. In re Sloan, 14 A. B. R., 435. 135 Fed., 873. In re Renda, 17 A. B. R., 521. 149 Fed., 614. Where, by arrangement, goods, including those claimed by the bankrupt as exempt, are sold, and fail to realize the appraised value, the bankrupt is only entitled to a proportionate part of the proceeds. In re Arnold, 22 A. B. R., 392. 169 Fed., 1000.

Rule 13. Where an order has been entered dispensing with a trustee, the bankrupt, having made due claim to the exemption allowed him by law, may petition the Court to have the same set off to him (*a*), of which, notice shall be forthwith given by the clerk by mail to all creditors, who shall be required to appear and show cause against the same on a day fixed, not less than ten days thereafter.

(*a*) Smalley v. Langenour, 196 U. S., 93, 97. General Order XV.

FEES AND COSTS.

Rule 14. Where the clerk is directed by these rules to give notice by mail to creditors, he shall be entitled to five dollars ($5.00) for the first twenty notices, and ten cents (10c.) for each notice above that number, to be paid out of the estate, or by the party liable therefor (*a*).

(*a*) The clerk having to account for his fees to the Government, whether collected or not, is entitled to demand them in advance. Steever v. Rickman, 109 U. S., 74. Bean v. Patterson, 110 U. S., 401. Cavender v. Cavender, 10 Fed., 829. Hoysradt v. D. L. & W. Railroad, 182 Fed., 880.

Rule 15. The cost of advertising an application for a discharge in all cases shall be $4.00, which shall be paid to the clerk at the time of filing such application (*a*), and shall cover the expense of the advertisement, the proof of publication, and all matters connected therewith.

(*a*) Before incurring the expense of sending out notices of an application for a discharge, the clerk may require the bankrupt to indemnify him. Gen'l. Order X. But money so advanced by the bankrupt must be repaid to him out of the estate, as part of the expense of administration. In re Hatcher, 16 A. B. R., 722. 145 Fed., 658.

Rule 15 a. The clerk shall be entitled to the following fees not provided for by the statute (*a*).

For each order, appointing a receiver, and making a certified copy thereof	$1.00
For each injunction or restraining order issued	1.00
For certificates to bankrupts of their discharge, each (*b*)	1.00
For a certified copy of each order for the sale of real estate, each folio of 100 words	1.00
For sending notices to creditors of an application by a bankrupt for his discharge (*c*), for the first twenty notices	5.00
For each notice in excess of twenty, an additional	.10

(*a*) See Gen'l Order XXXV.

(*b*) See Rule 8 supra.

(*c*) See note to Rule 15.

Rule 16. Where a petition in voluntary bankruptcy is accompanied by an affidavit, that the petitioner is without and cannot obtain (*a*) the money with which to pay the filing fees, the petition shall be filed without requiring payment of the same. But if the clerk, referee, or trustee, has reason to believe that the affidavit is untrue (*b*), he may petition and obtain an order for the examination of the bankrupt; and if it is made to appear that the bankrupt has or can obtain the money to pay such fees, he shall be ordered to pay the same within a specified time, or otherwise the petition will be dismissed.

(*a*) Money in hand, such as that from a pension, otherwise exempt, may be subjected to the payment of the fees prescribed by the statute. In re Bean, 4 A. B. R., 53. 100 Fed., 262. Nor can a voluntary bankrupt retain his exemption without paying the costs of the proceedings, notwithstanding an affidavit of poverty. In re Hines, 9 A. B. R., 27. 117 Fed., 790. In re Mason, 25 A. B. R., 73. 181 Fed., 899. Contra. Sallers v. Bell, 2 A. B. R., 529. 94 Fed., 801. Much more, if he consents, can the costs be paid out of his exemption. In re Castleberry, 16 A. B. R., 430. 143 Fed., 1,018.

(*b*) A bankrupt's affidavit of inability is not conclusive, and where doubt is cast upon it the question may be properly sent to the referee to investigate and report. In re Collier, 1 A. B. R., 182. 93 Fed., 191. Anon, 2 A. B. R., 527.

See also Gen'l Order XXXV, 4.

INJUNCTIONS.

Rule 17. Applications for the stay of legal process or proceedings shall be made to the Court (*a*), except where the necessity is urgent, and the judge is absent from the district, or not reasonably accessible (*b*), in which case, they may be made to the referee in whose district the case arises, on certificate from the clerk to that effect. But where an injunction has been issued or a stay ordered by the referee, the Court may be moved, at any time within ten days thereafter, to have the same vacated.

(*a*) By Genl. Order XII, 3, applications for an injunction to stay the proceedings of a court, or of a United States or State Officer must be heard and decided by the Judge and not by the referee, except as he refers the application or any special issue to such referee to take and report the facts. It is strongly implied by the terms of this order that a referee has authority to issue an injunction for other purposes, and against other parties than those prohibited. In re Steuer, 5 A. B. R., 209, 214. 104 Fed., 976. In re Berkowitz, 16 A. B. R., 251. 143 Fed., 598. And where on an application for an injunction the parties submit to his jurisdiction, inasmuch as the Court might have referred the matter to him in the first instance, they will be held to their submission. In re Benjamin, 15 A. B. R., 351. 140 Fed., 320. So the petition for the stay of a sale may, by agreement, be heard and disposed of by the referee. In re Berkowitz, 22 A. B. R., 233. 173 Fed., 1,012. But where the rules of the district negative the power of the referee to issue an injunction, he is without jurisdiction. In re Siebert, 13 A. B. R., 348. 133 Fed., 781.

(*b*) By Section 38 (a) 3, of the Bankruptcy Act the referee is expressly authorized to exercise the powers of the Judge as to taking possession of and releasing the property of the bankrupt, on certificate from the clerk, showing the absence or sickness of the Judge, or his inability to act.

NOTICES.

Rule 18. All notices required by these rules to be given to creditors or parties interested, except as otherwise provided, shall be given by the clerk (*a*), by writing, mailed to their last known place of address.

(*a*) For fees of clerk for sending notices, see Rule 15 a, supra.

RECEIVERS.

Rule 19. Applications for the appointment of a receiver or for a warrant to the marshal to take possession of the property of the bankrupt shall be made to the court, except where the necessity is urgent, and the Judge is absent from the district, or not reasonably accessible, in which case they may be made to the referee, in whose district the case arises, on certificate from the clerk to that effect (*a*).

(*a*) This is the same provision, as that with regard to injunctions, found in Rule 17.

Rule 20. Except where notice would defeat the object to be attained, no receiver shall be appointed, nor any warrant to the marshal to take possession of the property of the bankrupt be issued, before adjudication, without notice (*a*) in writing to the alleged bankrupt of the time and place, when and where application therefor will be made, and a reasonable opportunity to be present and be heard thereon, due proof of which notice shall be made under oath.

(*a*) A receiver ought not to be appointed before an adjudication, without notice to the bankrupt; but may be, where notice would defeat the object of the appointment. In re Francis, 14 A. B. R., 676, 136 Fed., 912, affirmed *sub nom.* Latimer v. McNeal, 16 A. B. R., 43. 142 Fed., 451.

PETITION OF REVIEW.

See Referee.

RECLAMATION PROCEEDINGS.

Rule 21. A petition for the reclamation of property in the hands of a receiver or trustee shall be made to the Court, and shall describe the property, and state the nature of the petitioner's ownership, and how the property came into the possession or control of the bankrupt; which petition shall be heard by the Court, after notice to the receiver or trustee, and answer made thereto; or may be referred to a special master, to hear and make report thereon (*a*).

(*a*) In re Tracy, 24 A. B. R., 539. 179 Fed., 366.

REFEREES.

Rule 22. Referees shall transmit to the clerk the bonds of trustees as soon as they are filed; but shall retain all other papers and records until the cases are severally closed, when they shall transmit the same to the clerk with certificates to that effect.

Rule 23. Referees shall transmit to the clerk a list of the claims which have been proved against the estate, with the names and addresses of the creditors who have proved the same, after all claims have been presented that they have reason to believe will be. They are not required to transmit a separate statement of each proof of debt as it is made.

Cf. Gen'l Order XXIV.

Rule 24. Referees shall not be required in their monthly returns of expenses to make separate statements in each case, but only a general statement of their expenses in all cases collectively, since the last monthly statement was made.

Rule 25. In the event of the resignation or removal of a referee, the fee of fifteen dollars ($15.00) required to be deposited with the clerk, for the benefit of the referee, at the time the petition is filed, shall be paid to the referee to whom the case was originally sent, without regard to whether or not the case was closed by him or by his successor. But, in case of the death of a referee, such fee shall be paid to the referee by whom the case is closed.

Rule 26. A petition for the review (*a*) by the Court of an order of a referee shall be in the prescribed form (*b*), and be filed with the referee (*c*) within ten days (*d*) after such order was made, or, otherwise (*e*), will not be entertained.

(*a*) By Gen'l Order XXVII, a petition for the review of an order of the referee must be filed with the referee and must set out the order complained of, upon which the referee shall certify to the Court the question presented, a summary of the evidence, and the finding and order made.

(*b*) For form of petition see Collier (8th Ed.), 1053. Form No. 162.

(*c*) A mistake in filing the petition with the clerk instead of the referee may be corrected, even though the time for filing has expired. In re Nippon Trading Co., 25 A. B. R., 695. 182 Fed., 959.

(*d*) Such a petition must be filed within a reasonable time. Crim v. Woodford, 14 A. B. R., 302. 136 Fed., 34. In re Nichols, 22 A. B. R., 216. 166 Fed., 603. And what is reasonable may properly be fixed by standing rule. In re Foss, 17 A. B. R., 439. 147

Fed., 790. It should never be allowed to unreasonably delay the settlement of the estate. In re Grant, 16 A. B. R., 256. 143 Fed., 661. Ten days may be regarded as a proper time limit. In re Scherr, 14 A. B. R., 794. 138 Fed., 695. Thirty days should not be exceeded except under extreme circumstances. In re Verdon Cigar Co., 27 A. B. R., 56. 193 Fed., 813. Where there is no rule it rests in the sound discretion of the Court. Bacon v. Roberts, 17 A. B. R., 421. 146 Fed., 729. In re Nippon Trading Co., 25 A. B. R., 695. 182 Fed., 959.

(*e*) After the time so fixed has passed, a petition can only be filed by special leave. In re Lesher, 25 A. B. R., 218, 176 Fed., 650.

SALES.

Rule 27. All sales of a bankrupt's property, real or personal, shall be public, unless otherwise ordered; and due advertisement thereof shall be given; (1) by notices mailed to all creditors at their respective addresses, at least ten days before the date of sale; (2) by ten hand bills posted on the premises and in the most public places in the neighborhood for a like period; and (3) by publication in a designated newspaper of the district, which publication in the case of real estate shall be once a week for four consecutive weeks, the last publication to be at least three days before the day of sale (*a*). In the case of public sales by a receiver or by the marshal, the notices to creditors shall be sent by the clerk, a list of whom shall be furnished at the time by the party petitioning for the sale; but in case of sales by a trustee, they shall be sent by the referee, who orders the same.

(*a*) The Act of March 3, 1893, 27 Stat., 751, requiring four weeks' advertisement of real estate sales in the Federal Courts, does not apply to sales in bankruptcy. In re Edes, 135 Fed., 595, 14 A. B. R., 382. In re National Mining Co., 193 Fed., 232, 27 A. B. R., 92. A provision for four weeks' publication requires that the first advertisement shall be at least twenty-eight days before the sale. Wilson v. Northwest, &c., Co., 65 Fed., 38.

Rule 28. Sales of a bankrupt's real estate shall be made as ordered by the referee, on petition of the trustee, upon such terms as may be prescribed in the order. The petition of the trustee shall accurately describe the property, and set forth the title of the bankrupt, and the liens and incumbrances upon it; and no order for a sale free and clear of liens (*a*) shall be made, nor any lien or incumbrance be divested (*b*) without due notice to the holder or holders thereof (*c*), and a reasonable opportunity to be heard thereon, due proof of which notice shall be made under oath and filed with the referee before a sale is ordered.

(*a*) Where it is for the interest of general creditors the Court may order a sale of the bankrupt's real estate free and clear of liens, even though the encumbrances equal the value of the property. In re Keet, 11 A. B. R., 117. 128 Fed., 651. In re Shoe and Leather Reporter Co., 12 A. B. R., 248. 129 Fed., 588. In re Roger Brown & Co., 196 Fed., 758.

(*b*) An order of sale making no mention of liens will be taken to mean a sale subject to them. In re Platteville Foundry Co., 17 A. B. R., 291. 147 Fed., 828. But where the order directs that the sale shall be subject to the lien of a first mortgage, all other liens are thereby divested. In re Prince & Walter, 12 A. B. R., 675, 678. 131 Fed., 546.

(*c*) To sustain an order for the sale of real estate free and clear of liens, the record should show affirmatively that the holders of the liens had notice. In re Saxton Furnace, 14 A. B. R., 483. 136 Fed., 697. Allgair v. Fisher, 16 A. B. R., 278. 143 Fed., 962. In re Kohl-Hepp Brick Co., 23 A. B. R., 822. 176 Fed., 340.

Rule 29. Where, on a sale of real estate, the property is purchased by a lien creditor, whose lien is divested thereby, he shall be entitled to satisfy his bid by means of his lien to the extent that the same is prima facie reached by the sale; subject to exceptions by any party interested, and an order for the payment of the bid in money, or to a re-sale of the property, in case it is found that the lien is not reached (*a*).

(*a*) See in re Saxton Furnace Co., 14 A. B. R., 483. 136 Fed., 697. In re Wyoming Valley Ice Co., 153 Fed., 787, 795. Wiegand v. Albert Lewis Lumber Co., 158 Fed., 608.

Rule 30. Returns of sales shall be made to the referee, by whom they shall be confirmed nisi, with leave to any party interested, to file exceptions within ten days. If no such exceptions are filed, the referee shall certify to the Court the record of the sale, including the petition, order, proofs of notice, posting and publication, and return; and if found to be in conformity with law, the Court shall confirm the same finally, and authorize the trustee to execute the necessary deed or deeds to the purchasers; which order of confirmation shall recite the description of the property at length, and be spread in full on the minutes. Or, if exceptions are filed, the referee shall return them to the Court with the rest of the record to be proceeded with as may be thereupon ordered.

The appraisement made by the trustee is not necessarily a measure of the adequacy of the price at which it is bid off. In re Zehner, 27 A. B. R., 536. 193 Fed., 787.

Rule 31. Private sales of real estate (*a*) shall be subject in all respects to the same regulations as public sales, except that there shall be no posting or publication of notices (*b*).

(*a*) See General Order XVIII. It is discretionary with the Court, whether to order a public or a private sale. In re Hawkins, 11 A. B. R., 49. 125 Fed., 633. In re Edes, 14 A. B. R., 382. 135 Fed., 595.

(*b*) Where liens are to be divested, personal notice to the lienors should be given in case of a private the same as a public sale. Allgair v. Fisher, 16 A. B. R., 278. 143 Fed., 962.

Rule 32. Private sales of personal property, whether made by a trustee or by a receiver, shall not be confirmed without ten days' notice by mail to creditors.

Rule 33. Where the goods of a bankrupt are sold by the marshal, the money realized shall be paid into Court, to be disposed of as may be ordered.

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Additional Rules Issued Since the Publication of Archibald's Federal Rules.

FEES OF RECEIVERS, TRUSTEES AND ATTORNEYS.

Rule 34. Receivers, Attorneys for Receivers, Trustees, Attorneys for Trustees, and Referees in rendering accounts, or making claim for fees and compensation, shall fully itemize the accounts rendered and accompany all claims for fees and compensation with a full statement of the services rendered.

RULES AND FEE BILL GOVERNING CHARGES OF FEES BY REFEREE IN BANKRUPTCY.

NOW, June 17th, 1913, Referees in Bankruptcy will be allowed the expenses necessarily incurred in the performance of their duties, according to the following scale of maximum charges, until otherwise ordered.

1. Amounts paid for advertisements (vouchers annexed).

2. For all clerical aid in preparing advertisements and notices to creditors of first meeting, mailing the same and proof thereof, keeping register, files and records, and preparing typewritten memoranda of proceedings prior to the first meeting of creditors, including stationery, envelopes, printing, letters, messages, and all petty expenses, $5.00.

3. For similar clerical aid, etc., on notices of application for confirmation of composition, $5.00.

4. For similar clerical aid, etc., on notices of each and any other meeting of creditors, $2.00.

5. If notices to creditors exceed 20 in number, in any of above cases, 10 cents in addition to the above for each notice in excess of 20 (the number of creditors to be stated).

6. For use of office and for clerical aid in taking and keeping notes and records of proceedings at first meeting of creditors up to choice or appointment and qualification of

trustee (any adjournments at creditors' request to be paid for by them at the same rate), $2.50.

7. For use of office and for clerical aid in taking and keeping notes and records of proceedings, for each subsequent meeting of creditors, $2.50.

8. For clerical aid in taking and perpetuating testimony on the examination of the bankrupt or other persons before the referee (where the parties do not agree with the referee's approval in taking such examination themselves) ten cents per folio, whether taken in long hand or transcribed from stenographer's notes, to be paid by the party examining the bankrupt or witness; for any copy of testimony, 10 cents per folio, to be paid by the party ordering the same.

9. For copies of orders, or other papers, 50 cents; if exceeding one page, 25 cents additional for each page, to be paid by the party ordering.

10. A deposit of $15.00 with the referee at the time of appearance before him, to meet the foregoing expenses fixed by these rules, shall be required in all cases, the same to be refunded out of the assets of the estate.